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March 11

REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF TENNESSEE

FOR THE

WESTERN DIVISION

APRIL TERM, 1905.

EASTERN DIVISION

SEPTEMBER TERM, 1905.

MIDDLE DIVISION

DECEMBER TERM, 1905.

CHARLES T. CATES, JR.
ATTORNEY-GENERAL AND REPORTER.

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¹Appointed to office created by Acts of 1905.

²Appointed to vacancy created by death of Cave Johnson.

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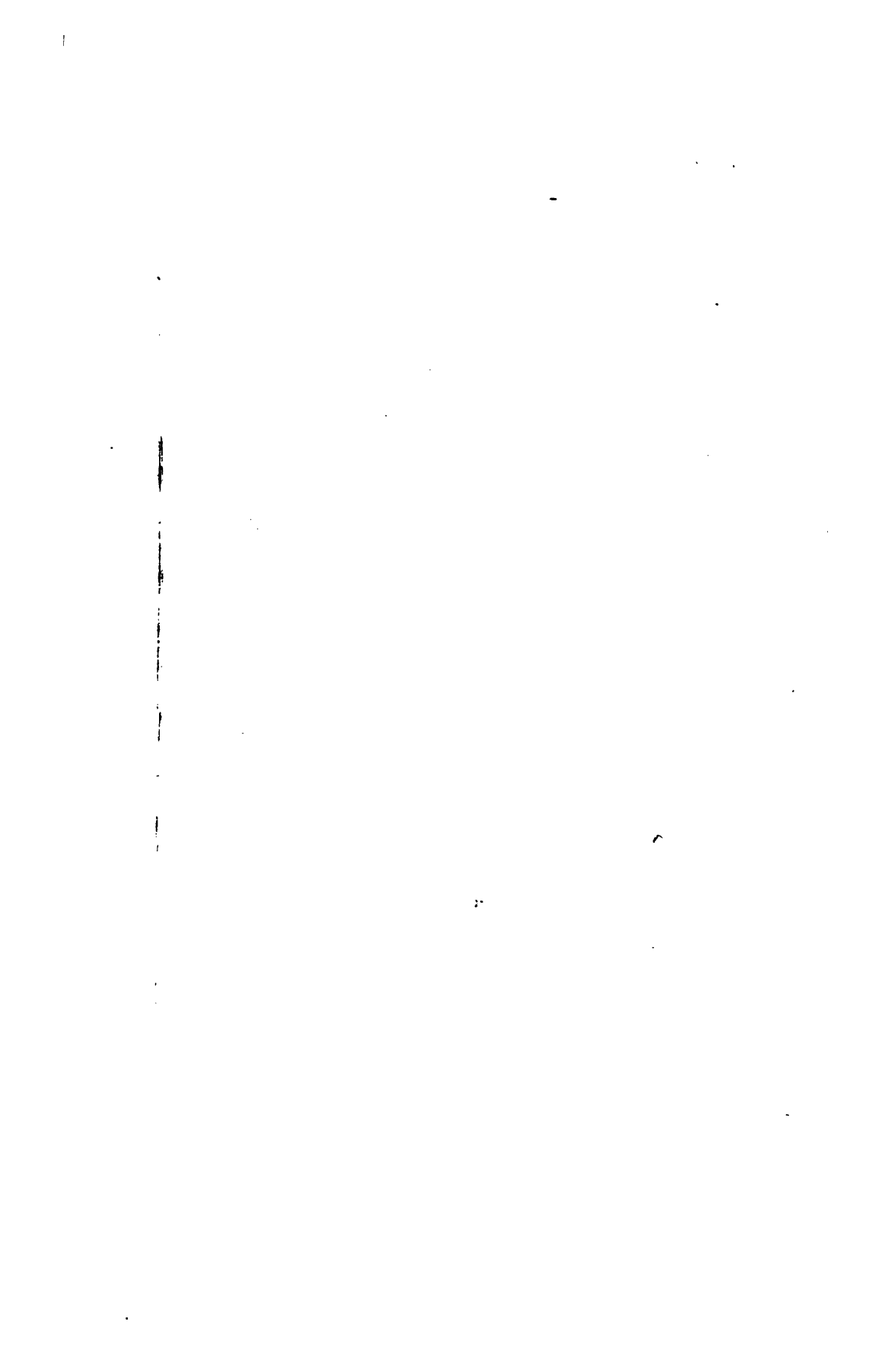
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CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF TENNESSEE
FOR THE
WESTERN DIVISION.

JACKSON, APRIL TERM, 1905.

HARRIS L. BROWN *v.* FORD N. TAYLOR.

(Jackson. April Term, 1905.)

1. **COVENANTS AGAINST INCUMBRANCES.** Action for breach, notwithstanding covenantee's actual knowledge thereof.

The covenantee may maintain an action at law for the breach of a covenant against incumbrances contained in a deed of conveyance of land, where there was an unexpired lease upon the premises, although he had actual knowledge of such lease. (*Post*, pp. 4-8.)

Case cited and approved: *Perkins v. Williams*, 5 Cold., 512.

2. **SAME.** Breach does not entitle covenantee to counsel fees as damages.

The covenant against incumbrances contained in a deed of conveyance of land breached by the existence of an unexpired lease on the premises does not entitle the covenantee to recover as damages counsel fees incurred in the misdirected action to evict the lessee prior to the expiration of his term. (*Post*, p. 8.)

Case cited and approved: *Williams v. Burg*, 9 Lea, 455.

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3. **SAME.** Breach does not entitle covenantee to special damages, where it is not the essential or proximate cause of such damages.

The fact that a purchaser of land disclosed to his vendor that his purpose in buying the same was to make subdivision thereof does not entitle him to special damages for a breach of the vendor's covenant against incumbrances on the ground that such breach prevented the purchaser from obtaining possession of a portion of the land covered by an unexpired lease during the existence thereof, where the breach of the covenant was not the essential cause of preventing the opening of the land for subdivision, for the reason that streets upon which the subdivision was to front had not been formally opened to the public, and could not have been so opened until after the expiration of the lease. (*Post*, pp. 8-11.)

4. **SAME.** Damages for breach by existence of unexpired lease is ordinarily the rental value thereof.

The covenant against incumbrances contained in a deed of conveyance of land breached by the existence of an unexpired lease on the premises, in the absence of circumstances authorizing the recovery of special damages, entitles the covenantee to the rental value of the premises during the existence or currency of the lease as damages or compensation for such breach of the covenant against incumbrances. (*Post*, pp. 8-11.)

FROM SHELBY.

Appeal from the Circuit Court of Shelby County.—
J. S. GALLOWAY, Judge.

Brown v. Taylor.

R. G. BROWN, for plaintiff.

FLIPPIN & NEUHARDT, for defendant.

MR. JUSTICE MCALISTER delivered the opinion of the Court.

The plaintiff below, Harris L. Brown, recovered judgment against the defendant, Ford N. Taylor, for the sum of \$92.65, as damages for breach of covenant against incumbrances contained in a deed for the sale of land. Both sides appealed and have assigned errors.

The cause was heard by the circuit judge, without the aid of a jury, upon evidence which is practically undisputed. The record reveals that on the 29th of February, 1904, Ford N. Taylor and wife conveyed to Harris L. Brown, by deed duly executed and recorded, a tract of land in the suburbs of Memphis, for which Brown agreed to pay the sum of \$5,600, whereof \$1,400 was paid in cash, and notes executed for the balance of the purchase money, due in one, two, and three years, with interest from date. The deed contained the usual covenants and warranties that the premises were free from incumbrances and that the grantors would forever defend the same against all lawful claims whatever.

It is disclosed by the record that the property was purchased by Brown for the purpose of making a subdivision, and it was agreed that, upon certain cash

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payments being made, any portion of the property desired would be released from the operation of the trust deed executed to secure the deferred payments.

It further appears that at the date of the deed there was an incumbrance on the land, consisting of an outstanding lease, with ten months to run before its expiration. It was contended on behalf of Taylor that Brown had actual knowledge of the incumbrance, and that the lessee thereby became his own tenant. It is shown that Taylor, the vendor, before executing the conveyance, stated to the agent who was negotiating the contract of sale that there was a gardener on the land who had a lease until such time as he could get his crop gathered for that year, probably some time in September or October, and that he desired this gardener to be protected. It is further shown that this agent, before the deed was executed or title examined, communicated to Brown the fact that there was a gardener on the place and Taylor wanted him protected, and that this gardener was at the time paying as rental the sum of \$7.50 per month. Brown replied that he did not know about the \$7.50 per month, but supposed the matter could be arranged in some way. Plaintiff below now seeks to recover damages for breach of the covenant against incumbrances, upon the facts stated in regard to the existence of an outstanding lease on the premises. It is denied on behalf of Taylor that Brown is entitled to any recovery, for the reason that he accepted a deed with full knowledge of this incumbrance,

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and that he must look to the tenant for his protection. Counsel for defendant cites in support of his contention Ballard's Law of Real Property, vol. 6, sec. 142, in which the rule is thus stated: "Where the grantee in a conveyance of lands in fee simple which contains a covenant against incumbrances, and before execution and delivery of the deed, has actual knowledge of the existence of a lease made between grantor in said conveyance and a tenant, the tenant being in actual possession of the premises, the grantee cannot maintain against his grantor an action for breach of covenant"—citing *Demars v. Kochler*, 60 N. J. Law, 314, 38 Atl., 808. In the last case the court said: "There can exist no question in law that an outstanding term of an unexpired lease on the premises conveyed is an incumbrance, within the covenant against incumbrances contained in the deed of conveyance. *Fritz v. Pusey*, 31 Minn., 368, 18 N. W., 94; *Jarvis v. Buttrick*, 1 Metc. (Mass.), 480; *Batchelder v. Sturgis*, 3 Cush., 201; *Carter v. Denmans' Ex.*, 23 N. J. Law, 261-272; *Grice v. Scarborough*, 2 Spears, 649, 42 Am. Dec., 391; *Mau-pin on Real Estate*, p. 293, sec. 125."

While this rule is undoubtedly supported by highly respectable authority, it is not in our view the sound rule, and is not sanctioned by the weight of authority. The true rule has thus been formulated in the *Cyclopedia of Law and Procedure*, vol. 11, p. 1066, as follows: "Knowledge on the part of the purchaser of the existence of incumbrances on the land will not prevent

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him from recovering damages on account of it, where he protects himself by proper covenants in his deed"—that is to say, we may add, a covenant against incumbrances. The author cites in support of the text cases from twenty-three states of the union, including the case of *Perkins v. Williams*, 5 Cold. (Tenn.), 512. In the last case cited, decided by this court in 1868, it was held that covenant of seisin embraces a defect of title, constituting want of seisin to covenant, although such defect of title was known to covenantee at the time of the making of the covenant. Knowledge by covenant or of such a defect will not bar his action at law for breach of covenant"—citing American notes to *Wallam v. Hearn*, 2 Leading Equity Cases; also, Rawle on Covenants, c. 13. It is true that the matter involved in the last case was an alleged breach of covenant of seisin, and it was held that, while equity would not lend its aid to rescind a covenant of seisin, although the covenantor be insolvent, where it appears that the covenantee knew of the defect of title at the time he took the conveyance, in such a case the party will be left to such remedy as he can obtain at law for breach of the contract. Rawle, in the second edition of his valuable work on Covenants of Title (page 149), states the law to the same effect as follows: "In a case where there are known incumbrances of any kind on property, subject to which purchaser agrees to take, these should, for the vendor's protection, be especially and expressly excepted from the covenant, as otherwise the fact of their

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being known to the purchaser will, according to the weight of authority, be no bar to his recovery upon it." So, in a case in Connecticut, it was said: "How can plaintiff's knowledge destroy the effect of defendants' covenant? Suppose defendants had sold a farm, which they and the purchaser knew they did not own, could that knowledge destroy or affect the covenant of seisin? If not, by what rule can such knowledge impair a covenant of warranty against incumbrances? Such evidence might probably be excluded on two grounds: One, because of its immateriality, and the other, under the rule that parol evidence is not admissible to control or contradict the effect of written instruments." Rawle on Covenants, p. 157. Again, on page 152, Mr. Rawle says: "It has, moreover, been said that the fact of the purchaser having notice of the incumbrance is the very reason for his taking covenant within whose scope it is included, and that the vendor may be expected to discharge it out of the purchase money. For all these reasons, therefore, whenever the contract is that the purchaser takes the land *cum onere*, the incumbrances should be expressly excepted in the deed from the operation of the covenant, in which case, of course, the covenantor will not be liable."

The general rule is that the right of action on covenant against incumbrances arises upon evidences of an incumbrance, irrespective of any knowledge on the part of grantee, or of any eviction of him, or of any actual injury it has occasioned him. 2 Greenleaf on Ev., sec.

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242; 2 Washburn on Real Property, sec. 717. So, that it is clear upon authorities plaintiff below was entitled to maintain his action at law for breach of covenant against incumbrances, notwithstanding his actual knowledge of the unexpired lease upon the premises.

The remaining question that arises is in respect of the proper rule for admeasurement of damages. The trial judge adopted as a measure of the damages the rental value of said property for the unexpired term at \$8 per month. He also allowed counsel fees, amounting to \$10, incurred by Brown in a misdirected action before a justice of the peace to evict the lessee from the premises. It was admitted on all hands that the lessee was rightfully in possession of the premises, and of course, the purchaser, Brown, had no right to evict him until the expiration of his term. It may be remarked there was no authority for the allowance of counsel fees in such a case; but, on the contrary, in *Williams v. Burg*, 9 Lea, 455, it was expressly decided by this court that counsel fees are not taxed as costs, nor regulated as to amount by law in this State, and that sums paid therefor by the covenantee for defense in ejectment by adverse claimant are not recoverable from covenantor. This principle is conclusive of any allowance for counsel fees in this case.

Recurring to the question made touching the measure of damages, it is insisted on behalf of counsel for Brown that, when he purchased this land, he disclosed to his grantor that his purpose in buying the land was to make

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division, and the proof of the record establishes this contention. It further appears that, by reason of the existence of this outstanding lease, the purchaser was prevented from acquiring immediate possession of the premises; but it does not appear that this fact prevented a subdivision of the premises. On the contrary, it distinctly appears that the streets upon which this subdivision was to front, although dedicated to the public, had not been formally opened, and could not have been opened up to and including the time of the expiration of this lease. The contention on behalf of Brown is that, having thus been deprived of immediate possession of his premises, he should be entitled to recover at least the interest he was paying on the deferred payments, and should not be confined to the rental value of the premises. Plaintiff invokes the familiar rule that, when a contract is made under special circumstances and those circumstances are communicated by one party to another, the damages resulting from breach of contract, which they would reasonably contemplate, constitute the true measure for the assessment of damages, citing 13 Cyc. of Law and Procedure, p. 34. We are unable to concur in this contention, for the obvious reason that it does not appear from this record that the breach of covenant against incumbrances was the essential cause of preventing the opening of this land for subdivision; but, on the contrary, it appears that, if the plaintiff, Brown, had obtained immediate possession of the premises, subdivision could not have been made on account

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of unopened streets until after the expiration of the term of this lease. Hence, it does not appear that special damages, claimed by Brown to have been within the contemplation of the parties, in fact resulted as a proximate consequence of the breach of covenant. Hence, the facts herein stated do not present a case for the application of the rule invoked, but for the ordinary rule which obtains in such cases, namely, the rental value of the property during the period purchaser was kept out of possession. As stated in the Cyclopedia of Law and Procedure, in speaking of a covenant against incumbrances, that being a covenant of indemnity, the general rule for the measure of damages in actions for its breach, by reason of an incumbrance existing upon the property at the time of the sale, is the loss actually sustained by the covenantee, with interest. Damages, costs, and expenses, when given as a penalty for breach of covenant, mean the necessary, natural, and proximate damages resulting from such known performances, and not some remote accidental or special injury to the party to whom the right of action accrues. The author further says that, in an action for breach of covenant against incumbrances, if the incumbrance has inflicted no actual injury to plaintiff, and he has paid nothing towards removing or extinguishing it, he can only recover nominal damages. Where incumbrance is removed by the grantor without expense or trouble to grantee, the latter can recover only nominal

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damages—citing volume 11, pp. 1164, 1165; *Eagan v. Yeaman* (Tenn. Ch., 1897), 46 S. W., 1012.

We are constrained to hold, upon the facts disclosed in this record, that the plaintiff has sustained actual damages in being deprived of immediate possession of the premises; but in view of all the facts, it is adjudged that he is only entitled to recover rental value of the property during the currency of the lease as compensation for the breach of covenant against incumbrances. As modified herein, the judgment is affirmed.

Smith v. Bank.

LILLIE SMITH v. NORTH MEMPHIS SAVINGS BANK, Admr.

(*Jackson*. April Term, 1905.)

1. **COMMON LAW.** In its entirety and as a distinctive system was never in force in Tennessee, but only what was in force in North Carolina.

The common law in its entirety and as a distinctive system of laws was never in force in Tennessee, but only such part thereof was in force in Tennessee as had been adopted and was in force in North Carolina when the territory embraced in Tennessee was ceded by North Carolina to the federal government. (*Post*, pp. 17-19.)

Acts cited and approved: 1789, ch. 3.

Cases cited and approved: *Porter v. State*, M. & Y., 227; *Nunnely v. Doherty*, 1 Yer., 27; *Tisdale v. Munroe*, 3 Yer., 320; *Egnew v. Cochrane*, 2 Head, 320.

2. **STATUTES.** Repealed by Code of 1858, except as therein provided.

The Code of 1858 superseded all other statutory law in this State, including the English statutes previously in force, except as therein specially provided. (*Post*, pp. 18, 19.)

Code cited and construed: Sec. 58 (S.); sec. 42 (M. & V.); sec. 41 (T. & S. and 1858).

Case cited and approved: *State v. Miller*, 11 Lea, 626.

3. **CODE OF TENNESSEE.** Object to digest and compile existing statutes, not to enact new ones; statutes not presumed to be changed.

The object of the legislature in the appointment of the compilers of the Code of 1858 was to have the then existing statutes digested and compiled, not to draft new laws; and it will not be presumed that in enacting the said Code it was intended to change the laws then in force, but to revise and compile them into a more tangible form. (*Post*, p. 30.)

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Cases cited and approved: *Bates v. Sullivan*, 3 Head, 633; *Burgner v. Burgner*, 11 Heis., 733; *Hospital v. Fuqua*, 1 Lea, 608; *State v. McConnell*, 3 Lea, 338.

4. **STATUTES.** Re-enacted alone, or in a compilation or Code, the judicial construction previously placed upon it forms part of the enactment.

It is a universal rule of construction that where a statute has received a judicial interpretation, and is afterwards re-enacted, whether alone or in a compilation or a codification of the laws of the State, the judicial construction, which had theretofore been placed upon it, forms a part of the enactment. (*Post*, pp. 30, 31.)

Cases cited and approved: *Calhoun v. Little* (Ga.), 32 S. E., 86, 43 L. R. A., 633, 71 Am. St. Rep., 254; *Anderson v. Bell* (Ind.), 39 N. E., 735, 29 L. R. A., 541; *Cargill v. Kountze* (Tex.), 22 S. W., 1015, 25 S. W., 13, 24 L. R. A., 183, 40 Am. St. Rep., 853,

5. **MARRIAGE.** Must be solemnized under statute; common law marriages are void.

Statutes (Shannon's Code, sections 4189-4200), requiring parties proposing to marry to procure a license and make their contract in the presence of certain officers or a minister of the gospel are mandatory, and abrogate the common law in relation to marriages, and provide a new and exclusive manner in which such contracts should be made, and render common law marriages illegal and void. (*Post*, pp. 15-17, 19-32.)

Code cited and construed: Secs. 4189-4200 (S.); secs. 3294-3305 (M. & V.); secs. 2439-2447 (T. & S. and 1858); secs. 2447a-2447d (T. & S.)

Acts cited and construed: 1715, ch. 1; 1715, ch. 38, sec. 15; 1741, ch. 1, secs. 1, 3, 4, and 6; 1766, ch. 9, secs. 3, 6, 7, and 8; 1778, ch. 7, secs. 3-5; 1815 ch. 47.

Cases cited and approved: *Bashaw v. State*, 1 Yer., 177; *Grisham v. State*, 2 Yer., 589.

Cases cited, distinguished, and approved: *Johnson v. Johnson*, 1 Cold., 630; *Andrews v. Page*, 3 Heis., 667.

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6. SAME. Presumed or established by reputation, when.

In all cases, except prosecutions for bigamy and actions for criminal conversation, a marriage may be presumed, or be established by reputation after a lapse of many years. (*Post*, p. 33.)

Cases cited and approved: *Ewell v. State*, 6 Yer., 364; *Rogers v. Park*, 4 Hum., 480.

7. SAME. Same. Presumed from cohabitation as husband and wife for a long time, when; estoppel to deny marriage in civil suit; wife's rights as widow.

Where a man and woman lived together as husband and wife for twenty-five years and until the death of the husband, and during all that time had recognized and treated each other as husband and wife, and were so recognized and accepted by the public at large, the deceased husband, if living, would be estopped from asserting that they had been legally married, and hence in a suit by her as complainant to enforce her marital rights as his widow against his estate, it will be presumed as against his personal representative that they were legally married and such representative is estopped to controvert her rights as widow and distributee of such decedent. (*Post*, pp. 15-17, 32-36.)

FROM SHELBY.

Appeal from the Chancery Court of Shelby County.—
F. H. HEISKELL, Chancellor.

HENRY CRAFT, for complainant.

No counsel marked for defendant.

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MR. JUSTICE SHIELDS delivered the opinion of the Court.

Complainant sues the defendant, as the administrator of Joseph Smith, deceased, for the estate of the decedent remaining in its hands after payment of indebtedness and costs and expenses of administration, claiming the same as widow and sole distributee of the intestate.

The defendant, answering, admits that it is the administrator of Joseph Smith, deceased, and that it has in its hands a fund due to his distributees, but denies that the complainant is his widow and distributee and entitled to the fund. It admits that it has no knowledge of any next of kin of the decedent, and that complainant is the only claimant of the estate in his hands. It expresses a willingness to pay over the estate to whomsoever the court may hold to be entitled to it.

The record discloses these facts:

Joseph Smith and the complainant, then Lillie Kimes, both being capable to contract marriage, mutually agreed to live together as man and wife, and in 1878, without license or any ceremony, complainant assumed the name of Lillie Smith and all the duties of a lawful wife. They lived and cohabited together, keeping house as married people, from then until the death of Joseph Smith, in 1903, and during that period recognized and treated each other as husband and wife, and were so recognized and accepted by their friends and acquaintances, and the public generally, in the community where they resided, and it was not known by

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any one but themselves that they had not procured license and entered into a marriage contract before one of the officers, or a minister of the gospel, authorized by statute to solemnize the rites of matrimony, until after the death of Joseph Smith. It does not appear where they were when they agreed to become husband and wife, but from about that time until the death of Joseph Smith they resided in Memphis, where he engaged in business.

Complainant insists that the agreement made by Joseph Smith and herself in 1878 constituted a valid common-law marriage, and from that time until the death of the decedent she was his wife, and since is his widow, and entitled to all the rights in his estate allowed widows of decedents by the laws of Tennessee.

She further insists that, regardless of whether or not a common-law marriage is valid in Tennessee, said Joseph Smith, after having lived with her and recognized and held her out to the world as his wife for more than twenty-five years, would, if living, be estopped from asserting to the contrary in any civil action she might institute to enforce marital rights, and that his personal representative, standing in his place, is estopped to controvert her claim as widow of its intestate.

Without stating the evidential facts tending to prove it, further than is already done, we find that there is made out in the record a clear case of common-law marriage between Joseph Smith and the complainant, entered into in 1878, and that they lived and cohabited

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together as man and wife until his death in 1903, without the validity of their pretended marital relations being called in question by either of them or others.

The question then presented is whether a common-law marriage contracted in Tennessee is valid?

Marriage under the common law was purely a civil contract. No particular form was required to be observed by parties entering into it. A simple agreement made by a man and woman that they would live together as man and wife constituted a valid marriage.

It is said for the complainant that the common law in its entirety was adopted in this State, and is yet in force, except so far as superseded or modified by affirmative statutes; that the provisions upon this subject contained in our Code (Shannon's Ed., sections 4189-4200), requiring parties proposing to marry to first procure license and make their contract in the presence of certain officers or a minister of the gospel, are not mandatory; and that valid marriages may now be contracted in the State, either in the common-law form or as prescribed by these provisions.

We are of the opinion that this contention is not tenable. The common law in its entirety was never in force in Tennessee. As a distinctive system of laws it was never adopted by our general assembly or other authority, and obtained in Tennessee only as a part of the laws of North Carolina, in so far as it had been adopted and was in force in that State when this territory was ceded by it to the federal government.

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The general assembly of North Carolina, by a statute enacted in 1789, declared that such parts of the common law and the acts of the late general assemblies, not inconsistent with and repugnant to the freedom and independence of the people or the form of government then established, should continue in force in that State, which then included Tennessee, and the common law and statutes so declared to be in force, save as repealed and amended by subsequent statutes of North Carolina, were the law of this territory so long as it was a part of that State. *Porter v. State*, Mart. & Y., 227; *Tisdale v. Munroe*, 3 Yerg., 320; *State v. Miller*, 11 Lea, 625.

The cession act, enacted by the general assembly of North Carolina in 1789 and accepted by the congress of the United States April 2, 1790, provided that the laws in force and in use in North Carolina at the time of passing that act should be and continue in full force in the territory ceded until the same should be repealed or altered by the legislative authority of the territory. *Nunnely v. Doherty*, 1 Yerg., 27.

And by our constitutions adopted in 1796 and 1834 it was provided that all laws then in force in the territory previous to 1796, and those in Tennessee previous to 1834, not inconsistent with those instruments, respectively, should continue in force until they should expire, be altered, or repealed by the general assembly. *Egnew v. Cochrane*, 2 Head, 320.

This was the status of the common law and the statutes of North Carolina previous to the cession act,

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in Tennessee, save as modified by subsequent legislation, until the adoption of our Code of 1858, which superseded all other statutory law in this State except as therein specially provided. Code, 1858, section 41 (Shannon's Code, section 58); *State v. Miller*, 11 Lea, 626.

North Carolina, early in its history, began to legislate upon the subject of the marriage relation, and prescribed the form and manner in which it should be contracted, and the statutes enacted by its legislature previous to the cession act continued in force in Tennessee, with but slight alterations, until the adoption of the Code in 1858, and are substantially carried into it. Therefore, in order to fully understand our present statutes upon this important subject, and ascertain the intention of the legislature in enacting them, it is necessary that we examine those of North Carolina passed in the period referred to and of this State passed before 1858. Those of North Carolina and of Tennessee previous to 1829 are reviewed in the able and exhaustive opinion of this court, delivered by Judge Whyte, in the case of *Bashaw v. State* (1829), 1 Yerg., 177, which involved the precise question now under consideration, and, although quite lengthy, we can do no better than quote from it. It is there said:

"The legality of the first marriage must therefore depend upon the acts of assembly of the State of North Carolina passed before the separation of the State of Tennessee from the State of North Carolina, and the

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acts of Assembly of the State of Tennessee passed since that separation. These acts have all been cited and commented upon by the counsel upon both sides; and upon them, on the part of the State, it is argued that they are all affirmative statutes, except one clause, or section, in the act of 1776, and that is virtually repealed by the act of 1778, and therefore they do not repeal the common law, by which law the marriage with Sally Cole is a valid marriage. On the other side, it is argued that these acts of assembly are introductive of a new law respecting marriage, inconsistent with the common law, superseding it, and establishing, as a consequence, that the putative marriage of the plaintiff in error with Sally Cole is not a valid marriage. The construction of these acts of assembly, on legal principles, must be had on a view of them taken altogether. Lord Mansfield, in the case of the *King v. Lansdale* and Others, 1 Burrows' Rep., 447, lays it down that 'where there are different statutes *in pari materia*, though made at different times, or even expired, and not referring to each other, they shall be taken and construed together as one system and as explanatory of each other;' and he instances the laws concerning church leases, those concerning bankrupts, and those providing for the poor, as one system relative to the subject, respectively. A short view of our acts of assembly respecting marriage will therefore be taken. The first act is St. 1715, c. 1. We know nothing of it in certainty except its title, which is: 'An act concerning

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marriages.' It is noted in the oldest revisal of the North Carolina laws within our reach [Davis' Revisal of 1773] as obsolete, and only now noticed by us as showing that at a very early period after the organization of the colonial government the subject attracted the attention of its legislature, and was by them considered of sufficient magnitude to require legislative interference by act of assembly. The next act is the thirty-eighth chapter of the same year (section 15), requiring the registration of all marriages, and imposing it a duty on every married man to remit to the register a certificate of his marriage and cause the same to be registered, under a penalty. The next is St. 1741, c. 1, entitled 'An act concerning marriages.' Section 1 commences as follows: 'For preventing clandestine and unlawful marriages, it is enacted,' etc., 'that every clergyman of the church of England, and for want of such, any lawful magistrate shall join together, in the holy estate of matrimony, such persons who may lawfully enter into such a relation and have complied with the directions hereinafter mentioned.' Section 3 says: 'No minister or justice of the peace shall celebrate the rites of matrimony between any persons, or join them together as man and wife, without license first had and obtained for that purpose, according to the directions of this act, or thrice publication of the banns as prescribed by the book of common prayer.' And in the following clause it says: 'If any minister or justice of the peace shall, contrary to the true intent

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and meaning of this act, celebrate the rites of matrimony,' etc., 'he, or they, shall forfeit and pay the sum of fifty pounds.' Section 6 directs the license to be issued by the clerk of the county where the *feme* resides, and then only under the rules prescribed; that is, he shall take bond, with security, in the penalty of fifty pounds, that there is no lawful cause to obstruct the marriage for which the license is desired; and in the case of minors, if not heretofore married, the consent of the parents or guardian be personally given before the said clerk, or signified under the hand and seal of the parent or guardian, attested by two witnesses, which being done, the clerk shall write the license or consent as aforesaid, to the first justice in commission of the peace, or such other person as the governor shall appoint. And a license so obtained is declared a lawful license, and no other. And by a subsequent clause, if the clerk issue a license, or make a certificate of license other than directed by the act, he shall forfeit and pay fifty pounds. The next act is St. 1766, c. 9. Its title is 'An act to amend an act entitled "An act concerning marriages."' This act, in its leading features, is of the same import as the act of 1741. It expresses, recapitulates, and reenacts the great requisites necessary to the constitution of a legal or valid marriage, and enforces their observance under penalties. It makes some alteration as to the persons authorized to solemnize the rites of matrimony, extending the provision. The first section recites 'that whereas by the

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act of 1741, no minister or justice of the peace shall celebrate the rites of matrimony between any persons without license or certificate of publication; and whereas the Presbyterian or dissenting clergy, conceiving themselves not included in the restriction of ministers mentioned in that act, have joined persons together in holy matrimony without either publication or license,' etc. The second section declares all marriages that have been solemnized by the dissenting or Presbyterian clergy, legal and valid. In the seventh section it is made lawful for any Presbyterian minister to celebrate the rites of matrimony in their usual and accustomed manner, under the same regulations and restrictions, as any lawful magistrate might do the same. And section 8 requires the marriage so solemnized by any Presbyterian minister to be under license from the governor. The third section, that no minister of any church of England or justice of the peace shall, under the penalty of fifty pounds, solemnize any marriage or join any persons together as man and wife, without certificate of thrice publication of banns, according to the directions of this act, or license first had under the hand and seal of the governor, who is authorized to grant the same on certificate of the clerk of the county court of his having taken and filed in his office the usual bond, in the penalty of fifty pounds, that there is no lawful cause to obstruct the marriage for which the license is desired. The sixth section imposes the same duty upon the clerk, before making the certificate to

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the governor under the third section of this act, that it did by the fourth section of the act of 1741, before he issued the license and under the same penalty. The last clause of the eighth section says: 'And that all marriages solemnized as aforesaid, without such license, shall be and are hereby declared illegal and void.' The next act (1778) is in substance the same as the preceding acts of 1741 and 1776, authorizing in the second section all regular ministers of the gospel of every denomination, having the care of souls, and all justices of the peace, to solemnize the rites of matrimony according to the rites and ceremonies of their respective churches, and agreeably to the rules in this act prescribed. By section 3 the power of granting license is given to the clerk of the county court in which the *feme* resides, he first taking bond in the name of the governor and his successors, with sufficient security, in the sum of five hundred pounds, that there is no lawful cause to obstruct the marriage. By section 4 every minister of the gospel, qualified as in the act directed, or other person appointed by the church a reader, is authorized and empowered to publish the banns of matrimony, which shall be made three several Sundays, and shall give a certificate of such publication directed to any authorized minister or justice of the peace. And by section 5, if any minister or justice of the peace shall knowingly join together in matrimony any two persons in any way or manner, other than by this act directed, he shall forfeit and pay for every such offense

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the sum of fifty pounds. And if any clerk shall knowingly grant marriage license in any way or manner, other than in this act directed, he shall forfeit and pay the sum of one hundred pounds. Acts 1815, c. 47, requires the minister of the gospel, or the justice of the peace, who solemnizes the rites of matrimony, to indorse on the back of the license the time of the marriage, and to sign his name thereto, and return the license to the clerk of the county court, whose duty it shall be to file the license in the office, which license and certificate shall be considered as competent evidence of the said marriage."

The provisions of our Code (Shannon's Edition) and the statutes amending them since its enactment, in relation to this matter, are as follows:

"Sec. 4189. All regular ministers of the gospel of every denomination, and Jewish rabbis, having the care of souls, and all justices of the peace, judges, chancellors, the governor, speaker of the senate, and speaker of the house of representatives in the State, may solemnize the rite of matrimony.

"Sec. 4190. No formula need be observed in such solemnization, except that the parties shall respectively declare, in the presence of the minister or officer, that they accept each other as man and wife.

"Sec. 4191. Before being joined in marriage, the parties shall produce to the minister or officer aforesaid, a license under the hand of the clerk of the county court where the female resides, or where the marriage is sol-

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emmnized, directed to such minister or officer, authorizing the solemnization of a marriage between said parties.

"Sec. 4192. The clerk may issue such license to any one applying for the same, unless he knows that one of the parties is incapable of marriage, first taking bond to the State, with sufficient surety, in the sum of twelve hundred and fifty dollars, conditioned that there is no lawful cause to obstruct the marriage for which the license is desired; for which penalty any person aggrieved by the marriage may sue. (1778, c. 7, section 3.)

"Sec. 4193. The minister of the gospel, or Jewish rabbi, or justice of the peace, or judge, or chancellor, or governor, or speaker of the senate, or speaker of the house of representatives, who solemnizes the rite of matrimony, shall indorse on or append to the license the time of the marriage, and sign his name thereto, and return the license to the clerk of the county court within six months thereafter.

"Sec. 4194. The clerk shall, at the foot or on the back of each license, place the following form of certificate, to be signed by the person solemnizing the marriage: "I solemnized the rite of matrimony between the above (or within) named parties on the —— day of ——, 18——."

"Sec. 4195. If a clerk knowingly grant marriage license to persons incapable thereof, he shall forfeit and pay a fine of five hundred dollars, to be recovered by

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action of debt, for the use of the person suing.

"Sec. 4196. If any minister or officer knowingly join together in matrimony any two persons not capable thereof, he shall forfeit and pay the sum of five hundred dollars, to be recovered by action of debt, for the use of the person suing.

"Sec. 4197. In each of the foregoing cases, the party violating these provisions shall be guilty of a misdemeanor. . . .

"Sec. 4199. All marriages contracted and entered into during the late rebellion and duly solemnized as the law directs are hereby declared valid to all intents and purposes, and the issue of said marriages are hereby declared legitimate.

"Sec. 4200. Whenever any marriage in this State may have been heretofore or may hereafter be celebrated between persons, by license regularly issued as required by law, the same shall be valid and binding in law, and the issue thereof is hereby declared legitimate, although the baptismal name of either party may be omitted in said license, and a nickname be used instead thereof, provided the parties may have consummated the marriage by cohabitation, and can be identified as the persons between whom such marriage was solemnized." Shannon's Code, sections 4189-4200.

It was held by this court in this case (*Bashaw v. State*, supra) that the statute therein considered abrogated the common law, in relation to marriage contracts and provided a new and exclusive manner in

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which such contracts should be made, and all marriages attempted to be entered into without an observance of the statutes were declared to be null and void. Judge Whyte, for the court, says:

"The more important provisions of these acts of assembly are almost entirely the same, exhibiting a settled purpose to fix and regulate the contract of marriage so as to rest or be dependent on municipal law alone, establishing a system intended to be complete in itself, evidenced by the attention paid to every particular, in form as well as substance, which the importance of such a relation, both in a private and a public view, so deservedly merited. Hence, these acts of assembly, as was intended by them, operate and effect a change in the form and substance of the marriage contract, and its solemnization, from what it was at the common law: (1) In requiring publicity and permanency of its evidence, by the registration of the marriage, and filing the license and certificate of marriage, by the acts of 1715 and 1815. (2) In requiring a regular, certain authority, empowering the solemnization of the marriage, which is a license of a certificate of the publication of banns, by the acts of 1741, 1766, and 1778. (3) In requiring the actual solemnization of the marriage ceremony by a person properly qualified, who is a clergyman of the church of England, or a justice of the peace by the act of 1741; a minister of the church of England, a Presbyterian or dissenting minister, or a justice of the peace by the act of 1776; and a

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regular minister of the gospel having the care of souls, or a justice of the peace, by the act of 1778. In requiring the consent of the parent or guardian, when the parties or either of them are under the age of twenty-one, and not theretofore married, by Act 1741, section 6, which is legally provided for in the act of 1778, requiring the first taking bond, before the license is granted, in the name of the governor and his successors, with sufficient security, in the sum of five hundred pounds, with condition that there is no lawful cause to obstruct the marriage for which the license is desired. These requirements change wholly the manner of solemnizing the matrimonial union from what it was at the common law, declaring and enacting that they shall be complied with in the future, and that the celebration of marriage shall not be otherwise than as directed in these acts, and enforcing the performance and due execution of them under forfeitures and penalties recoverable by law, besides the express declaration in terms 'that all marriages, solemnized as aforesaid, without such license first had, shall be and are hereby declared illegal and void.' We say that these requirements, under these circumstances, constitute such a body of proof as to render irresistible, in our opinions, the correctness of the position that a marriage, to be valid, must be according to these acts, and that the common law is wholly superseded on the same subject by them. To say otherwise would be not only to prostrate the well-directed labors of the legislature on the subject for the

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last one hundred years, but on our part the expression of a gratuitous and improper assumption that the legislature did not intend what they have so repeatedly and expressly declared."

This case was approved and followed in that of *Grisham v. State*, decided by this court in 1831, and reported in 2 Yerg., 589.

These cases are controlling and conclusive of this one. The provisions of the Code (1858) relating to the form and manner of entering into the marriage relation are a re-enactment of the statutes of North Carolina and Tennessee upon this subject and construed in *Bashaw v. State*, supra, and must be given the same force and effect. The object of the legislature in the appointment of the compilers of the Code was to have the then existing statutes digested and compiled, not to draft new laws; and this court has held that it will not be presumed that in enacting the Code it was intended to change the laws then in force but to revise and compile them into a more tangible form. *Bates v. Sullivan*, 3 Head, 633; *Burgner v. Burgner*, 11 Heisk., 733; *Tennessee Hospital v. Fuqua*, 1 Lea, 608; *State v. McConnell*, 3 Lea, 338.

And it is the universal rule of construction that where a statute has received a judicial interpretation and is afterwards re-enacted, whether alone or in a compilation or a codification of the laws of the State, the judicial construction which had theretofore been placed upon it, forms a part of the enactment. 26 Am. & Eng.

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Ency. of Law, 650, and cases there cited; Sutherland on Stat. Construction, sections 255, 256; *Calhoun v. Little* (Ga.), 32 S. E., 86, 43 L. R. A., 633, 71 Am. St. Rep., 254; *Anderson v. Bell* (Ind. Sup.), 39 N. E., 735, 29 L. R. A., 541; *Cargill v. Kountze Bros.* (Tex. Sup.), 22 S. W., 1015, 25 S. W., 13, 24 L. R. A., 183, 40 Am. St. Rep., 853.

We are, therefore, satisfied, and hold, that it was the intention of the general assembly, in enacting the provisions of the Code of 1858 upon the subject under consideration, to abrogate the common law in relation to marriages, and provide a new and exclusive manner in which such contracts should be made. This has been the construction which has been placed upon the original statutes and the provisions of the Code since the decision of the case of *Bashaw v. State*, supra, by the courts of this State, and it should not now be disturbed. But we fully agree with the reasoning of our predecessors in *Bashaw v. State*, and if the question was one of first impression we would hold as there held. There are only two cases in our reports in which this construction of our statutes has been doubted in the slightest. They are *Johnson v. Johnson*, 1 Cold., 630, and *Andrews v. Page*, 3 Heisk., 667, and are all that are relied upon in the brief for complainant. In *Johnson v. Johnson*, Judge McKinney, speaking for the court, refers to *Bashaw v. State* as holding that the common law upon the subject of marriage contracts in Tennessee was abrogated by statute, and declines to express an opinion

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whether the decision was sound in principle or supported by authority, but follows it in the case then under consideration. The case of *Andrews v. Page* involved the validity of a marriage of negroes while slaves, and the construction of a statute in 1866 validating such marriages. It did not involve the validity of a common-law marriage between white persons, and, while the case of *Bashaw v. State* was criticised, it was not overruled or modified. The first assignment of error of the complainant must be decided against her.

We are, however, of the opinion that the second contention of the complainant must be sustained, upon the authority of the case of *Johnson v. Johnson*, supra. As above stated, these parties, Joseph Smith and the complainant, who lived together as man and wife, in Memphis, for more than twenty-five years, during all that time had recognized and treated each other as husband and wife, and were so recognized and accepted by the public at large. Joseph Smith, if alive, would be estopped to deny his liability for any contracts which the complainant might have made which would have bound a husband in lawful marriage, such as for necessities and also in any proceeding begun by the complainant to enforce a right claimed by her in virtue of the reputed marital relations. This doctrine was announced and enforced by this court in *Johnson v. Johnson*, supra, where the reputed wife, in litigation with the reputed husband, was held to be estopped to deny the validity of her marriage after a lapse of twenty-five years, Judge

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McKinney, speaking for the court, says:

"For nearly a quarter of a century before the filing of this bill, the parties had cohabited as husband and wife, believing all that time that they had been lawfully married, as did all others with whom they had intercourse. And the question whether, after so great a lapse of time, such a marriage can be declared void from the beginning, is one in which not only the parties but the public also have a deep interest, in view of the consequences as affecting the status of children born of the marriage, the relations of affinity and consanguinity which may have sprung from it, the rights of property which may have been acquired on the faith of it, and all the consequential rights, obligations, and duties growing out of it.

"Upon established principles and analogies of the law, we think it may be held that under the circumstances of this case a lawful marriage for all civil purposes will be conclusively presumed, and that neither the parties themselves, nor third persons, perhaps, will be heard to disprove or deny the marriage.

"It is a familiar doctrine that in all cases, except prosecutions for bigamy and actions for criminal conversation, a marriage may be presumed, or be established by reputation after a lapse of many years. *Ewell v. State*, 6 Yerg., 364; *Rogers v. Park's Lessee*, 4 Humph., 480.

"And the principle is equally familiar that where persons have represented themselves to be married; or

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have assumed the relation of husband and wife, cohabiting and holding themselves out to the public as such, though not in fact married, they will, when it is sought to charge them with any of the civil liabilities growing out of that relation, be conclusively presumed to sustain such relation to each other, and will not be permitted to disprove or deny the marriage. 1 Greenl. on Ev., sections 27, 207. It is laid down by Starkie that in an action against husband and wife, it is sufficient to prove the marriage *de facto* by evidence of cohabitation, acknowledgment, or reputation; and they cannot prove in defense that they were not legally married. 2 Stark. on Ev. (3d Am. Ed.), 291; 2 Salk., 437; *Divoll v. Leadbetter*, 4 Pick., 220.

“Whether or not such persons can acquire rights as against others, it is clear that others may acquire rights against them. And the principle of estoppel upon which this doctrine rests and which is based upon principles of morality, as well as of public policy, must be held to apply equally to both parties. The woman in such a case is no more privileged to commit fraud or crime than the man.

“And if they are estopped as to third persons, why shall they not, as against each other in all civil cases, be also precluded other in all civil cases, be also precluded from gainsaying the marriage? Do not the same reasons of morality and policy apply in the one case as in the other? And more especially should they be held to be estopped as between themselves, when

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either is seeking to disturb or defeat rights which may have been acquired by the other, either directly or indirectly, on the faith of the marriage.

"In the case of *Divoll v. Leadbetter*, 4 Pick., 220, which was an action of trespass for breaking and entering plaintiff's close, it appeared that the land of the reputed wife of the defendant had been taken and expended upon the rents and profits for the term of four years as the freehold of the defendant in right of his supposed wife. To defeat the title thus acquired the defendant attempted to prove the invalidity of the marriage. A marriage in lawful form had taken place, but, the parties being within the prohibited degree of kindred, it was void under the statute. It was held that the defendant could not set up the illegality of the marriage as a defense to the action; that it would be contrary to morality, as well as the policy of the law, to permit him to claim any right or exemption on account of his own crime.

"In the case of *Wilkinson v. Payne*, 4 Term Rep., 468, which was an action on a promissory note given to the plaintiff in consideration of his marrying the defendant's daughter, the defense was that, though there was a marriage in fact, it was not a legal marriage. On the trial it was left to the jury to presume a subsequent legal marriage, which they accordingly did; and the court of king's bench was unanimous in refusing a new trial. Lord Kenyon, in delivering the judgment, said that, 'though the first marriage was defective, a subse-

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quent one might have taken place; that the parties had cohabited together for a length of time, and were treated by the defendant himself as man and wife; and these circumstances afforded a ground on which the jury might presume a subsequent marriage.'

"In 3 Phillips on Evidence (Ed. 1843), 286, it is said the usual presumptive proofs arising from the cohabitation of the parties as man and wife have not been taken away by the marriage act, and that, although the existence of license or publication of banns may be disproved, yet even in such a case there may be sufficient ground for presuming a subsequent legal marriage from the cohabitation of the parties as man and wife and other circumstances. 1 Black, 367; Peake's N. P., 232."

We think that the case at bar is on all fours with that of *Johnson v. Johnson*, and that since Joseph Smith, if alive, would be estopped to deny that the complainant was his wife in a proceeding to enforce a right growing out of such relation, his personal representative is estopped to controvert the rights of the complainant as widow and distributee of the decedent.

The decree of the chancellor will be reversed, and one entered in accordance with this opinion.

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W. M. CARSON v. L. O. CARSON *et al.*

(*Jackson*. April Term, 1905.)

1. **WILLS.** Devise of fee with unlimited power of disposition defeats executory devise.

A fee-simple estate given in the first portion of a devise, with absolute power of disposition, will not be limited or cut down by subsequent clauses and provisions of the will; but the unlimited power of disposition in the first taker which will defeat an executory devise must be a power given by the will itself, and not one attaching as a legal incident to the estate given by the will. (*Post*, pp. 39, 40, 43, 45, 46-48.)

Cases cited and approved: *Booker v. Booker*, 5 Hum., 505, 511; *Sevier v. Brown*, 2 Swan, 114; *Brown v. Hunt*, 12 Hels., 404; *Ballentine v. Spear*, 2 Bax., 269; *Read v. Watkins*, 11 Lea, 158; *Bradley v. Carnes*, 94 Tenn., 27, 30; *Meacham v. Graham*, 98 Tenn., 201; *Clark v. Hill*, 98 Tenn., 300.

2. **SAME.** Same. Devise to husband with remainder to others subject to his funeral expenses and debts vests life estate only in him, with remainder over; case in judgment.

A devise of certain land by testatrix to her husband, with direction that at his death, after the payment of his funeral expenses and just debts, the remainder of said land shall go to others, vests in the husband not an absolute or unlimited estate, such as will defeat a devise over, but only a life estate in the land, coupled with a limited power of disposition, the power to consume the fee by debts, but not otherwise, nor in any other way to dispose of it, with remainder over to others. (*Post*, pp. 39, 40, 43, 45, 46-48.)

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3. **SAME.** Devise or bequest is not invalidated by mere misnomer of the corporation.

The mere misnomer of the corporation will not invalidate the devise or bequest, if it clearly appears who was intended thereby. (*Post*, p. 49.)

Cases cited and approved: *Trustees v. Reneau*, 2 Swan, 94; *Bank v. Burke*, 1 Cold., 623; *State v. Smith*, 16 Lea, 666.

4. **SAME.** Devise to a charitable corporation whose charter declares its charitable purposes and trusts need not declare the trusts.

A devise and bequest made direct to a charitable corporation, with the charitable purposes and trusts set out in its charter and articles of foundation, is valid, without setting out the trusts so specifically and definitely as if made to individuals, because the trusts are thus made certain and will control, subject to the directions of the testator, if any are given. But no trusts in such case need be declared, as they are set out in the charter and articles of foundation. (*Post*, pp. 50, 51.)

5. **SAME.** Same as 3 and 4. Charitable bequest to the board of trustees of the Cumberland Presbyterian Church vests in the corporation of the General Assembly of the Cumberland Presbyterian Church; case in judgment.

A devise of the remainder after the termination of the life estate in certain land, and a devise or bequest of the remainder interest in the proceeds of the sale of certain other lands after termination of the life estate therein, made to certain persons constituting the board of trustees of the Cumberland Presbyterian Church in the United States of America, and their successors, to be held and used by them as trustees only in such manner as to best promote the interest of christianity in the fields occupied by that church which it appears is incorporated under the name of the General Assembly of the Cumberland Presbyterian Church, is a valid charitable bequest to the corporation which it may hold under its charter for the charitable purposes and trusts set out in its charter and articles of foun-

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daton, with due regard and deference to the directions of the testatrix, and beyond that under the general trusts under which that corporation holds all its property, it being the evident intent of the testatrix that said remainder estate or interest vest in that church or corporation as a charitable organization of a religious character. (*Post*, pp. 39-51, and especially pp. 39-41, 49-51.)

FROM CARROLL.

Appeal from the Chancery Court of Carroll County.
—A. G. HAWKINS, Chancellor.

GEO. T. M'CALL, for complainant.

HAWKINS & PEELER, for defendants.

MR. JUSTICE WILKES delivered the opinion of the Court.

This is a bill to construe and contest the validity of certain clauses of the will of Sarah A. Carson.

These clauses are as follows:

"Secondly. I give, devise, and bequeath to my husband, W. M. Carson, the tract of land upon which I now reside, containing one hundred and sixty-five acres, and bounded on the north by lands of S. S. or John D. Pate and Dr. J. B. Jones; on the east by the lands in the name of Mary W. Ridley, deceased; and on the south by the lands of William Ridley and Horace Sexton, and on the west by John Morrison and the lands of the heirs

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of William Ingram; and at his death I direct that after his funeral expenses and just debts are all paid, the remainder of said tract to go to J. M. Gill, W. L. Reeves, J. M. Zarecor, T. R. Foster, P. W. Morris, A. B. Miller, W. B. Reeves, B. C. Porter, T. P. Dance, S. D. Chestnut, H. E. Conover and F. M. Pepper, constituting the board of trustees of the Cumberland Presbyterian Church in the United States of America, and their successors in office, to be held and used by them as trustees only in such manner as to best promote the interest of christianity in the fields occupied by the said Cumberland Presbyterian Church.

"Third. It is my wish, and I so direct, that the tract of land descended to me from my brother, G. W. Ridley, containing one hundred and forty acres, and bounded on the north by the lands of W. R. Snead and H. P. Gaines; on the east by the lands of H. P. Gaines and J. S. Reese; on the south by the lands in the name of Mary W. Ridley, deceased, on the west by the lands of Dr. J. B. Jones, to be sold at my death by my husband, W. M. Carson, in such manner as to him may be thought best, and the proceeds appropriated to the payment of the following bequests, viz: Five hundred dollars in trust to Rev. A. E. Cooper, T. W. Cannon, H. Bobbitt, H. C. Johnson, H. B. Thomas, B. P. Gilbert, W. E. Spear, J. M. Burns, R. B. Hamilton, J. W. Smith, W. M. Carson and Dr. Bright, composing the board of trustees of Bethel College, at McKenzie, in Carroll county, Tennessee, and their successors in office, to be appro-

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priated by them for said Bethel College in such manner as they may think best; one hundred dollars I give to Henry Ridley in consideration of his kindness to my brother, G. W. Ridley, in his last illness.

"I set apart two hundred dollars out of which to pay my annual contribution of five dollars to the Rev. A. E. Cooper, at Shiloh Church, and at his death the remainder of the two hundred dollars I want used in the erection of a monument over his grave, and I further direct that a sufficient amount be used to erect a double monument over the grave of my father and mother and one for myself and to put an iron fence around the family graveyard, and the remainder of the proceeds of one hundred and forty acres of land, if any, I give to my said husband, W. M. Carson, during his life, and at his death I direct that it go to the board of trustees of the Cumberland Presbyterian Church hereinbefore mentioned, and their successors in office, in trust, to be used in the promotion of christianity in such fields as may be occupied by the said Cumberland Presbyterian Church in the United States of America."

The defendants in this case, twelve in number, constitute the board of trustees of the Cumberland Presbyterian Church, and the bill also alleges that they are the successors in office of the trustees of said church as named in the will.

The bill further sets forth that, as to the construction of section 2 (designated "secondly") of the will above set out, a difference of opinion has arisen, and really

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exists; that complainant insists that under said section he is vested with an absolute fee in said lands, as set out in the section or item of said will. It alleges that, on the other hand, defendants insist that under said section the complainant is only vested with a life estate, and they with the remainder interest therein.

The bill further alleges that complainant, in accord with directions in said will as set out above, sold the land described in section 3 of said will; that he has paid off the specific bequests made in said section, and that there remains in his hands about ——— dollars; that in regard to this surplus a difference of opinion has arisen, and really exists; that complainant insists that under the will he is entitled to said amount absolutely; that the defendants, on the other hand, insist that complainant takes a life estate therein, and that they, as the board of trustees of the Cumberland Presbyterian Church, are entitled to the remainder interest therein.

It further alleged that there are no outstanding debts against the estate, and that said attempted devise and bequest constitute a cloud upon complainant's title to said lands and the surplus arising from said sale. The complainant prays a construction of the aforesaid portions of said will, and asks the court to state clearly what are complainant's rights thereunder, and what, if any, are the rights of the defendants thereunder; also that the cloud upon complainant's title to said property be removed.

To this bill the defendants filed a demurrer and an-

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swer. The demurrer sets up the following propositions:

(1) That the devise to defendants the board of trustees of the Cumberland Presbyterian Church in the second item of the will of Mrs. Carson is a valid devise to complainant for life, with remainder to said board after his death, subject to payment of his funeral expenses and just debts, and that complainant's contention that his estate in the lands therein devised is not merely a life estate, but an estate in fee-simple absolute, is not well taken.

(2) That the bequest to defendants the board of trustees in the third item of the will of Mrs. Carson is a valid executory bequest, subject to a life interest in complainant, and that complainant's contention that he is the absolute owner of the land is not well taken.

The appellants then answer as follows:

First. That they constitute a corporation duly chartered by the State of Kentucky. The charter, or rather a copy thereof, is made an exhibit to the answer, and by agreement of counsel and decree of the court is treated, without question, as the charter of the said board. It is alleged that the appellants are the lawful successors in office, as trustees under the provisions of said charter, to the trustees of said corporation designated in said will; that the trustees designated in said will were at the time of the execution of said will and at the time of the death of the testatrix regularly elected and qualified as trustees of said corporation.

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Second. That the appellants, constituting said board of trustees, have full power and authority, under said charter of incorporation, to receive in trust any donation, bequest, or other charities which may be or have been given to them for the use and benefit of the religious denomination known as the Cumberland Presbyterian Church, or its general assembly, for educational, religious, or charitable purposes, under the direction of said general assembly; that the said Cumberland Presbyterian Church is a religious body existing and maintained for the advancement of christianity; that all moneys and other estates of every description which are vested in said board of trustees by virtue of their office are to be forever held in trust for the use of the Cumberland Presbyterian Church, the interest thereof to be devoted to religious, charitable, or educational purposes under the direction of the said general assembly; that the purposes for which the devise and bequest of Mrs. Carson were made to the said trustees was one of the vital purposes, if not the chief purpose, for which the said board of trustees exists.

Third. That the defendants, as a board of trustees, are properly constituted, and capable of taking and using the property involved in the devise and bequest in such manner as to best promote the interests of christianity in fields occupied by said Cumberland Presbyterian Church.

Fourth. That the devise and bequest constitute a valid devise and a valid bequest for charitable uses,

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capable of being enforced by the appellant trustees in strict accordance with the intent of the testatrix, as set forth in her will, and that the appellee's contention that he is the absolute owner in fee of the property involved in the bequest is not well taken.

Fifth. That the appellants admit all the allegations of the original bill not inconsistent with the allegations of their answer.

The chancellor decided all the issues in favor of the complainant, and from his decree the defendants have appealed, and assign the following errors:

(1) The chancellor erred in overruling the appellants' demurrer to the effect that the devise to appellee for life, with remainder to said board of trustees after his death, subject to the payment of his funeral expenses and just debts, is a valid devise; that the bequest to the board of trustees is a valid executory bequest, subject to the life estate in appellee; and that the appellee's contention that he is the absolute owner of said land and said fund is not well taken.

(2) The chancellor erred in holding that, under the will of the testatrix, the appellee takes and is vested with an absolute estate in fee in the land mentioned and described therein.

(3) The chancellor erred in holding that, under the third clause of said will, the appellee is vested with a life, if not an absolute, estate in the surplus funds arising from the sale of the land therein mentioned.

(4) The chancellor erred in holding that that part of

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said clause referring to the board of trustees of the Cumberland Presbyterian Church is inoperative, of no effect, and void, and that the appellee, under said will, and as surviving husband of said testatrix, is entitled to and is vested with an absolute estate in said surplus money after paying the special bequests set out in said will.

These assignments may be resolved into three propositions, which we will discuss:

As to the first clause of the will in controversy, relating to the tract of 165 acres of land, it appears that the testator made an absolute devise of the same to her husband, W. M. Carson, in the first part of the clause; and the question presented is whether the words superadded later in the clause cut down this fee-simple or absolute estate.

These words are: "And at his death I direct that after his funeral expenses and just debts are all paid the remainder of said tract to go," etc.

The general doctrine laid down in our cases and in the text-books is that a fee-simple estate given in the first portion of a devise, with absolute power of disposition, will not be limited or cut down by subsequent clauses and provisions of the will. *Ballentine v. Spear*, 2 Baxt., 269; *Sevier v. Brown*, 2 Swan, 114; *Bradley v. Carnes*, 94 Tenn., 27, 30, 27 S. W., 1007, 45 Am. St. Rep., 696; *Meacham v. Graham*, 98 Tenn., 201, 39 S. W., 12; *Clark v. Hill*, 98 Tenn., 300, 39 S. W., 339; *Underhill on Wills*, sections 358, 491.

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In the present case a fee-simple estate is given in the usual terms, and the only question is whether the subsequent language defeats such estate.

We are of opinion it does.

Taking the entire clause as a whole, we are of opinion that the estate given is not a fee, with an absolute power of disposition in W. M. Carson, but his power of disposition, if it may be so called, is merely a power to consume it by debts, but not otherwise, or in any other way to dispose of it. It is not, therefore, an unlimited power of disposition, but one limited to a power to charge it with debts.

The power of unlimited disposition in the first taker which will defeat an executory devise must be a power given by the will itself, and not one attaching as a legal incident to the estate given by the will. *Booker v. Booker*, 5 Humph., 505, 511; *Brown v. Hunt*, 12 Heisk., 404.

So, in *Read v. Watkins*, 11 Lea, 158, it was held that ordinary words conveying the absolute title alone, without superadded words giving unlimited power of disposition, would not defeat an executory devise.

In that case the will contained this provision:

"After the death of my beloved wife, and after all her debts are paid, I devise, will and direct that the property, real and personal, of which she may die seized and possessed, including all moneys she may have, shall be equally divided among all my children and representatives," etc.

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We are of opinion that, under this clause of the will, W. M. Carson does not take an absolute or unlimited estate, such as will defeat a valid devise over.

We are of opinion, therefore, that the chancellor was in error in holding that W. M. Carson took the land mentioned in the second item in fee simple and absolutely, but he should have held that he took only a life estate, with remainder over.

It remains to be considered whether the devise and bequest over in the second and third items of the will for charitable purposes are valid.

The provision in the second item is that the remainder shall go to J. M. Gill and others, "constituting the board of trustees of the Cumberland Presbyterian Church in the United States of America, and their successors in office, to be held and used by them as trustees only in such manner as to best promote the interests of christianity in the fields occupied by the said Cumberland Presbyterian Church.

In the third item the testatrix directs the remainder of the proceeds of the 140 acres to go to the board of trustees of the Cumberland Presbyterian Church, hereinbefore mentioned, and their successors in office, in trust to be used in the promotion of christianity in such fields as may be occupied by the said Cumberland Presbyterian Church in the United States of America.

It is insisted that the devisee and grantee in each of these provisions is an incorporated body, capable of taking by gift, devise, or bequest, and that the devise

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and bequest is in the provision made to it in its incorporated capacity.

We find in the record a copy of a charter incorporating "a body corporate and politic by the name and style of the "Trustees of the General Assembly of the Cumberland Presbyterian Church," but we find no charter of incorporation under the name and style of the "Cumberland Presbyterian Church."

It appears that it is the general assembly of the church which is incorporated, and not the church itself.

It is evident that the testatrix intended the remainder in the land under the second item of the will and in the proceeds of land in the third item to vest beneficially in the Cumberland Presbyterian Church, as a charitable organization of a religious character. The corporate name of the church is not correctly set forth in the devise and bequest, but the intent is plain, and the party beneficiary cannot be mistaken.

The mere misnomer of the corporation will not invalidate the devise or bequest, if it clearly appears who was intended thereby. *State v. Smith*, 16 Lea, 666; *Bank v. Burke*, 1 Cold., 623; *Trustees v. Reneau*, 2 Swan, 94; *Morawetz on Corporations*, 181, 182.

We think it clearly appears that the devise and bequest was made to the trustees of the corporation, as representing it, and not to them as individuals; and the provisions of the will are therefore virtually to vest the

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property in the corporation of the General Assembly of the Cumberland Presbyterian Church, for the use and benefit of that church or denomination.

The devise and bequest being made direct to a corporation which is charitable, the trusts need not be set out so specifically and definitely as if made to individuals, in order to make them valid.

The reason is that a corporation organized for charitable purposes has these purposes and trusts set out in its charter and articles of foundation, so that the trusts are thus made certain and will control; due deference being paid to the directions of the testator, if any are given. But no trusts in such case need be declared, as they are set out in the charter and articles of foundation.

To illustrate: If a bequest be made to the Vanderbilt University or Cumberland University by name, the trusts to which the fund is to be applied need not be further specified by the grantee, since these are well-known charitable corporations, whose objects, purposes, and trusts are fully set forth in their charters and other instruments of foundation.

But if a devise or bequest is made to individuals, as trustees, then the trusts must be declared in the instrument giving the property.

We are of opinion that the devise and bequest in this case being made, as we have before held, to the corporation of the General Assembly of the Cumberland Presbyterian Church, that corporation will hold it un-

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der its charter and articles of foundation—due regard being paid to the direction of the testatrix, as far as given—and beyond that under the general trusts under which that corporation holds all its property.

We are also of the opinion that the corporation of the General Assembly of the Cumberland Presbyterian Church is authorized, under its charter, to accept devises and conveyances of real estate, as well as bequests of personal property, under the term "charities," used in that charter.

We are of opinion, therefore, that the devise over in the second item and the bequest over in the third item are valid charitable trusts; and the chancellor was in error in not so holding, and his decree is reversed, and the cause remanded to be further proceeded with in accord with this opinion.

The executor will pay costs of appeal out of the funds of the estate; costs of the court below will be adjudged by the chancellor.

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E. F. MOSELY v. STATE.

(Jackson. April Term, 1905.)

TAXATION. Interest on United States bonds cannot be taxed as such by the State.

The income derived as interest on United States bonds cannot be taxed as such by the State government, and a statute providing for such taxation is void and nonenforceable. The interest does not become taxable immediately upon being paid into the hands of the bondholder, and he is not bound to return, for taxation, the money so received immediately upon receipt thereof, or upon the mere appearance of the fact that he has received such sums from the government.

Acts cited and construed: 1903, ch. 258, secs. 8 and 16.

Cases cited and approved: *McCulloch v. Maryland*, 4 Wheat., 316; *Weston v. Charleston*, 2 Pet., 449; *Dobbins v. Erie Co.*, 16 Pet., 435; *Almy v. California*, 24 How., 169; *Railroad v. Jackson*, 7 Wall., 262; *Buffinton v. Day*, 11 Wall., 115; *United States v. Railroad*, 17 Wall., 322, 332; *Cook v. Pennsylvania*, 97 U. S., 566; *Van Brocklin v. Anderson*, 117 U. S., 151, 178; *Bank v. New York*, 121 U. S., 138, 162; *Steamship Co. v. Pennsylvania*, 122 U. S., 326; *Leloup v. Mobile*, 127 U. S., 640; *Pollock v. Loan & Trust Co.*, 157 U. S., 429, 581, 582, 584-586, 591, 592.

FROM WEAKLEY.

Appeal from the Circuit Court of Weakley County.—
R. E. MAIDEN, Judge.

Mosely v. State.

JONES & JONES, for Mosely.

ATTORNEY-GENERAL CATES, for the State.

MR. JUSTICE NEIL delivered the opinion of the Court.

The plaintiff in error was indicted and convicted in the circuit court of Weakley county, and fined \$10, for failing to answer a question propounded to him in the tax schedule left with him by the assessor for the year 1904. From this judgment he has appealed to this court, and assigned errors.

The question referred to appears in the schedule as follows:

“Class 5. The amount of income derived from U. S. bonds and all other stocks and bonds not taxed ad valorem?”

This question was embraced in the schedule under the authority of section 16 of chapter 258, p. 644, of the Acts of 1903. That section provides that the comptroller of the treasury of the State shall prepare assessment schedules, and furnish the same to the various county court clerks of the State, and the latter shall furnish these schedules to the assessor. It is directed that the schedule shall be so prepared as to conform to the different classification of assessments provided for in the act; that, among other things, this schedule shall contain a question based upon the classification of personality, as set out in section 8 of the act.

Section 8 reads as follows:

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"That all personal property of every kind shall be assessed under the following classification:

"Class 1. Household and kitchen furniture, tableware, libraries, jewelry, sewing machines, musical instruments, and all other personal property of a similar character.

"Class 2. Farming implements, machinery, wheeled vehicles, tools of all kinds, and all other personal property of a like character.

"Class 3. All kinds of live stock, including dogs.

"Class 4. Steamboats, ferryboats, and other kinds of water craft.

"Class 5. The amount of income derived from United States bonds, and all other stocks and bonds not taxed ad valorem.

"Class 6. All bonds, except United States bonds, and all shares of stock, except when the corporate property or capital stock is assessed in lieu of the shares of stock as hereinafter provided in sections 22 and 23 of this act.

"Class 7. Notes, duebills, choses in action, accounts, mortgages, or any other evidences of indebtedness and money on hand or on deposit, or invested in any manner in this State or elsewhere, not otherwise assessed.

"Class 8. All other personal property not hereinbefore designated."

The question above copied from the schedule is based on class 5, appearing in the foregoing section of the statute.

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On the trial of this case in the court below it was agreed as follows:

"Defendant has several thousand dollars of United States bonds, on which he receives income on the 1st day of January, April, July, and October of each year, which is paid him on each of said bonds on said dates, and, further, that said bonds are composed of three different classes of United States bonds, each of which provides on its face that neither the principal nor the interest thereon shall be taxable by any State, county, or municipality."

It is obvious from a reading of the section of the statute above quoted that the purpose of introducing the question above referred to into the schedule was to tax the interest received upon United States bonds, as distinct from the bonds themselves, and that there was no purpose to use the question merely as a means of ascertaining, by a process of elimination, as insisted by counsel for the State, the amount of cash which the taxpayer might have on hand. This latter item—the amount of cash on hand—is provided for under class 7.

So it appears that, when the plaintiff in error refused to answer the question as to the amount of income derived by him from United States bonds, he was resisting the power of the State to tax that income. No other question is made in this case.

Did the plaintiff in error act within his rights in so refusing? We are of opinion that he did. Really, the face of the bonds themselves, issued by authority of the

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federal government, settle the question, based as they were upon the federal statutes. In addition, it has been held ever since the case of *Weston et al. v. City of Charleston*, 2 Pet., 449, 7 L. Ed., 481, decided in 1829, that the States have no power to tax the governmental agencies of the federal government. Said the court in that case, speaking through Chief Justice Marshall: "A contract made by the government, in the exercise of its power to borrow money on the credit of the United States, is undoubtedly independent of the will of any State in which the individual who lends may reside, and is undoubtedly an operation essential to the important objects for which the government was created. It ought, therefore, on the principles settled in the case of *McCulloch v. State of Maryland* [4 Wheat., 316, 4 L. Ed., 579], to be exempt from state taxation, and consequently from being taxed by corporations deriving their powers from States."

Again it is said in the same opinion:

"The right to tax a contract to any extent, when made, must operate upon the power to borrow before it is exercised, and have a sensible influence upon the contract. The extent of this influence depends on the will of a distinct government. To any extent, however insensible, it is a burden on the operations of the government. It may be carried to an extent which shall arrest them entirely."

Referring to the foregoing authority, Chief Justice Fuller, in the case of *Pollock v. Farmers' Loan & Trust*

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Co., mentions the fact that the ordinance in the city of Charleston involved in that case was exceedingly obscure but that the opinions of Mr. Justice Thompson and Mr. Justice Johnson, who dissented, made it clear that the levy was upon the interest of the bonds, and not upon the bonds; and, in the case last referred to, Chief Justice Fuller treated *Weston v. Charleston* as an authority holding that a tax on the income of United States securities was a tax on the securities themselves, and equally inadmissible. 157 U. S., 429, 581, 15 Sup. Ct., 673, 39 L. Ed., 819.

Continuing the discussion, it is further said in that case:

"So, in *Dobbins v. Erie Co. Commissioners*, 16 Pet., 435, 10 L. Ed., 1022, it was decided that the income from an official position could not be taxed, if the office itself was exempt.

"In *Almy v. Cal.*, 24 How., 169, 16 L. Ed., 644, it was held that a duty on a bill of lading was the same thing as a duty on the articles which it represented (*Northern Cen. R. Co. v. Jackson*, 7 Wall., 262, 19 L. Ed., 88); that a tax upon the interest payable on bonds was a tax, not upon the debtor, but upon the security; and in *Cook v. Penn.*, 97 U. S., 566, 24 L. Ed., 1015, that a tax upon the amount of sales of goods made by an auctioneer was a tax upon the goods sold.

"In *Philadelphia & S. M. S. S. Co. v. Penn.*, 122 U. S., 326, 7 Sup. Ct., 1118, 30 L. Ed., 1200, 1 Interst. Com. R., 308, and *Leloup v. Mobile*, 127 U. S., 640, 8 Sup. Ct.,

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1380, 32 L. Ed., 311, 2 Interst. Com. R., 134, it was held that a tax on income received from interstate commerce was a tax upon the commerce itself, and therefore unauthorized." 157 U. S., 429, 581, 582, 15 Sup. Ct., 673, 39 L. Ed., 759, 819. These authorities were also referred to to the same effect in the opinion of Mr. Justice Field, pages 591-592 of 157 U. S., page 693 of 15 Sup. Ct. (39 L. Ed. 823). The principle is also recognized in the opinion of the other two judges who delivered the opinions in the case—Mr. Justice White and Mr. Justice Harlan.

The principle is further illustrated by the disposition made in the case referred to of a cognate question; that is, whether the federal government has the right in any form to tax the income on bonds issued by a State, or the municipality of a State.

The question is stated and discussed in the opinion of Chief Justice Fuller as follows: "Another question is directly presented by the record, as to the validity of the tax levied by the act upon the income derived from municipal bonds. The averment in the bill is that the defendant company owns two millions of municipal bonds in the city of New York, from which it derives an annual income of \$60,000, and that the directors of the company intend to return and pay the taxes on the income so derived.

"The constitution contemplates the independent exercise by the nation and the States, severally, of their constitutional powers.

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"As the States cannot tax the powers, the operations, or the property of the United States, nor the means which they employ to carry their powers into execution, so it has been held that the United States have no power, under the constitution, to tax either the instrumentalities or the property of a State.

"A municipal corporation is the representative of the State, and one of the instrumentalities of the State government. It was long ago determined that the property and revenues of municipal corporations are not subjects of federal taxation. *Buffington v. Day*, 11 Wall., 115, 20 L. Ed., 122; *United States v. Baltimore & Ohio R. Co.*, 17 Wall., 322, 332, 21 L. Ed., 597, 601. In *Buffington v. Day*, supra, it was adjudged that congress had no power, even by an act taxing all incomes, to levy a tax upon the salaries of judicial officers of a State, for reasons similar to those on which it had been held in *Dobbins v. Erie County Com'rs*, 16 Pet., 435, 10 L. Ed., 1022, that a State could not tax the salaries of officers of the United States. Mr. Justice Nelson, in delivering judgment, said: 'The general government and the States, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. The former, in its appropriate sphere, is supreme; but the States, within the limits of their powers not granted, or, in the language of the tenth amendment, 'reserved,' are as independent of the general government as that government, within

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its sphere, is independent of the States.

"This is quoted in *Van Brocklin v. Anderson*, 117 U. S., 151, 178, 6 Sup. Ct., 670, 29 L. Ed., 845, 854, and the opinion continues: 'Applying the same principles, this court in *United States v. Baltimore & O. R. Co.*, 17 Wall., 322, 21 L. Ed., 597, held that a municipal corporation within a State could not be taxed by the United States on the dividends or interest of stock or bonds held by it in a railroad or canal company, because the municipal corporation was a representative of the State, created by the State to exercise a limited portion of its powers of government, and therefore its revenues, like those of the State itself, were not taxable by the United States. The revenues thus adjudged to be exempt from federal taxation were not themselves appropriated to any specific public use, nor derived from property held by the State or by the municipal corporation for any specific public use, but were part of the general income of that corporation, held for the public use in no other sense than all property and income belonging to it in its municipal character must be so held. The reasons for exempting all the property and income of a State, or of a municipal corporation, which is a political division of the State, from federal taxation, equally require the exemption of all the property and income of the national government from state taxation.'

"In *Mercantile Nat. Bank of New York v. New York*, 121 U. S., 138, 162, 7 Sup. Ct., 826, 839, 30 L. Ed., 895,

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904, this court said: 'Bonds issued by the State of New York, or under its authority by its public municipal bodies, are means for carrying on the work of the government, and are not taxable even by the United States; and it is not a part of the policy of the government which issues them to subject them to taxation for its own purposes.' . . .

"The law under consideration provides 'that nothing herein contained shall apply to States, counties or municipalities.' It is contended that, although the property or revenues of the States or their instrumentalities cannot be taxed, nevertheless the income derived from State, county, and municipal securities can be taxed. But we think the same want of power to tax the property or revenues from the States or their instrumentalities exists in relation to a tax on the income from their securities, and for the same reason, and that reason is given by Chief Justice Marshall in *Weston v. Charleston*."

After quoting from the latter opinion the last excerpt which we have taken from that opinion, Chief Justice Fuller proceeds: "Applying this language to these municipal securities, it is obvious that taxation on the interest therefrom would operate on the power to borrow before it is exercised and would have a sensible influence on the contract, and that the tax in question is a tax on the power of the States and their instrumentalities to borrow money, and consequently repugnant

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to the constitution." 157 U. S., 584-586, 15 Sup. Ct., 673, 39 L. Ed., 820, 821.

The soundness of the foregoing views was recognized by all of the judges delivering opinions in the case referred to.

The proposition then seems to be well established in federal decisions that, if the security is exempt, the interest on the security is likewise exempt.

It is insisted by counsel for the State in the present case that, when the interest is paid, it falls into the general mass of the property of the State, and is then subject to taxation by the State.

Under what circumstances it may be justly said that the interest received from nontaxable securities has fallen into the general mass of the property of the State, we need not consider, inasmuch as the authorities above referred to—and they are controlling—hold that the interest does not become taxable immediately upon being paid into the hands of the holder of the security.

In the case of *Pollock v. Farmers' Loan & Trust Company*, supra, one purpose of the bill brought by a stockholder of the defendant corporation in that case was to prevent the latter from returning for taxation \$60,000 which it had derived as interest on bonds of the city of New York. Under this authority, and others quoted therein, we are of opinion that the holder of United States bonds may collect the interest due on such bonds, and that he is not bound to return the money so received immediately upon receipt of the same, or upon

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the mere appearance of the fact that he has received such sums from the government. What the result would be if these funds should be placed on deposit in a bank, or should be kept for a length of time, or should be used in the purchase of property, or otherwise employed for productive purposes, we need not consider, as the facts do not raise these points.

For the reasons stated, we are of opinion that his honor erred in assessing a fine against the plaintiff in error, and his judgment must be reversed, and the prosecution dismissed.

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FARMERS' & MERCHANTS' BANK v. BANK OF RUTHERFORD.

(*Jackson*. April Term, 1905.)

1. **BANKS AND BANKING.** Negligence in drawee bank to pay forged check, when.

It is negligence in a drawee bank to pay a forged check drawn on it in the name of its customer, whose signature is well known to it, where the cashier does not examine the signature closely, but relies on the previous indorsements. (*Post*, pp. 66, 70, 71.)

2. **SAME.** Check payable to a certain person or bearer need not be indorsed, nor need the holder be identified, and no negligence for failure to require identification.

A check payable to a certain named person, or bearer need not be indorsed, nor need the holder thereof be identified, and a bank paying such check without identification of the holder is not negligent, though the bank, in compliance with its custom, required it to be indorsed. (*Post*, p. 69.)

3. **BILLS AND NOTES.** Indorsement does not warrant to drawee the genuineness of drawer's signature, but only to subsequent holders.

The indorser of negotiable paper does not, by his indorsement, warrant to the drawee the genuineness of the signature of the drawer, but his indorsement extends such warranty only to subsequent holders in due course of trade. (*Post*, p. 70.)

4. **BANKS AND BANKING.** Drawee bank paying forged check is estopped to deny genuineness of signature of drawer as against a prior indorser.

Where the drawee bank received and paid a forged check, which had been previously honored and indorsed by other banks, and held it for thirty days or more, it thereby admitted the same to be correct, and it is precluded and estopped to deny

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the genuineness of the signature, or as against a prior indorser, to avoid the effect of its act in accepting the check and paying it. (*Post*, p. 67.)

Case cited, distinguished, and disapproved: *Bank v. Bank*, 88 Tenn., 299.

5. BILLS AND NOTES. Holder of negotiable instrument defined.

The holder of a negotiable instrument is the payee or indorsee who is in possession, or the bearer. (*Post*, p. 71.)

Acts cited and construed: 1899, ch. 94, sec. 52.

6. BANKS AND BANKING. Drawee by accepting check becomes a guarantor thereof.

The drawee of a check, by accepting the same, makes himself the guarantor thereof. (*Post*, p. 71.)

FROM GIBSON.

Appeal from the Chancery Court of Gibson County.—JOHN S. COOPER, Chancellor.

W. S. COULTER, for complainant.

DEASON, RANKIN & ELDER, for defendant.

MR. JUSTICE WILKES delivered the opinion of the Court.

The bill was filed by complainant bank against the defendant bank to recover from it the amount of a

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forged check, which was drawn on complainant bank, for \$54.75, and, after being indorsed by the defendant bank and others, was presented to, and paid by, complainant bank.

The check was in the words and figures following:

"Dyer, Tenn., Octo. 28, 1903.

"Farmers' & Merchants' Bank:

"Pay to J. L. Freeman, or bearer, fifty-four 75-100 dollars. For cotton.

"JOHNSTON MERO. Co."

The ground upon which the recovery was sought was that the Bank of Rutherford was negligent in cashing this check for a stranger without identification, and thereafter indorsing it, so as to give it circulation, and to mislead complainant bank, the payee, to presume it was genuine, and pay it to the holder.

The check, after being indorsed in the name of J. L. Freeman, was cashed by the Bank of Rutherford, and indorsed by it, and passed to the Jackson Banking Company, then to the St. Louis Trust Company, Continental National Bank of Chicago, and Fourth National Bank of Nashville, and by the latter bank was sent by mail to complainant as the drawee bank, and paid by it. The complainant bank at the time of payment wrote or stamped on its face the words: "Paid Nov. 7, 1903. Farmers' & Merchants' Bank, Dyer, Tenn."

The cashier of complainant bank states that, when the check was presented for payment, he did not examine the signature closely, and, if he had, he would

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have detected that it was a forgery, but that he was thrown off his guard by the indorsements of the defendant bank and others.

It held the check, thus cashed and marked "Paid," some thirty days, when the forgery was discovered, whereupon it entered up a credit upon the account of the mercantile company to balance the charge made against it when it was paid, and thereupon brought suit against the Bank of Rutherford for the amount of the check.

The chancellor gave judgment for the amount, and the Bank of Rutherford has appealed and assigned errors.

It is insisted that the case is governed by the principles announced in *People's Bank v. Franklin Bank*, 88 Tenn., 299, 12 S. W., 716, 6 L. R. A., 724, 17 Am. St. Rep., 884.

In that case it was held that a bank that negligently cashed a forged check, purporting to be drawn upon another bank, and had upon its indorsement of such check received payment of the drawee bank, is liable for the amount paid by it upon discovery that the check is forged, and the fact that the indorser bank is unable to give the name of the person who presented the forged check, to whom it was paid, or to positively identify such person, is sufficient evidence of negligence to make it liable, and that the drawee bank will not be precluded from recovery by the fact that, relying upon the

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indorsement of the indorsing bank, it paid the check without investigation as to its genuineness.

If this case is not distinguishable from that in some essential feature, and that is affirmed as sound, it must be considered as determinative of the present case.

As an original proposition we would not assent to the correctness of *People's Bank v. Franklin Bank*, and think the great weight of authority is against it, and that it is contrary to one of the most important rules regulating the law of negotiable instruments, to wit, that the drawee of the check should be held to know the signature of its customers, and to pay only such paper as has a genuine signature.

But we think there are two important distinctions between *People's Bank v. Franklin Bank* and the present case.

The first is that in that case the payment was made direct by the drawee bank to the bank that negligently cashed the check, and, after indorsing it, put it in circulation, and, as against the indorsing bank, there was no consideration received by the drawee bank, while in the present case the check had passed through a number of hands, and had been paid, not to the alleged negligent bank, but to the Nashville bank.

In the present case the drawee bank is not suing the Nashville bank, from which it received the check, and to whom it paid the money, but is suing a remote indorser, with whom it had no transaction, except as a remote indorser.

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In other words, the Rutherford bank received none of the money of the complainant bank, but it received the amount of the check from the Jackson Banking Company. It is the Nashville bank which has received the money of the complainant bank for the worthless paper cashed by it.

In addition, the check in *People's Bank v. Franklin Bank* was payable to the order of Morgan, and was indorsed in the name of Morgan; the indorsement being also a forgery. In order to cash this check, it was necessary that it be indorsed by Morgan, and that he should be identified; and it was incumbent on the bank, when it cashed it, to see that the indorsement was made, and that it was genuine.

But in the present case the check was payable to Freeman, or bearer. It was not necessary to be indorsed at all, and was indorsed, as the proof shows, simply as a compliance with the custom of the Rutherford bank. It was not only not necessary that it should be indorsed, but it was not necessary that Freeman, the holder, should be identified, and hence it was not negligence in the bank to fail to have him identified, and it was a *bona fide* holder, if it paid to bearer, with or without indorsement.

In *People's Bank v. Franklin Bank* identification and a genuine indorsement were not only material, but absolutely necessary, and a failure to require them was negligence. In the present case neither indorsement

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nor identification was necessary, and a failure to require them was not negligence.

Liability in *People's Bank v. Franklin Bank* is predicated upon negligence, which does not exist in the present case.

On an examination of the record we are not able to find any negligence on the part of the Rutherford bank, while that of the complainant bank is apparent and glaring; and, if a comparison is allowable, the negligence of the drawee bank was much the greater.

The mercantile company was its customer, and had been for years. Its place of business was next door to the complainant bank. Its signature was well known to complainant bank. The cashier says he did not examine the signature closely, or he would have easily have detected the forgery.

On the other hand, there was nothing to excite the suspicion of the Rutherford bank. It was a common cotton check, such as was usual and common in every day transactions; and, being payable to bearer, it was not necessary to identify the holder when it was cashed.

We are of opinion that the indorser of negotiable paper does not warrant to the drawee the genuineness of the signature of the maker, but such warranty only extends to subsequent holders in due course of trade. The drawee of the check is the party to pass upon the genuineness of the signature of the drawer.

This is the rule, we think, by the law merchant and by the negotiable instrument law. It is the rule laid

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down in New York, upon whose statute our negotiable instrument law is based, and of which it is substantially a copy; and, in construing the negotiable instrument law, it has been said by this court in *Unaka Bank v. Butler*, 113 Tenn., 574, 583, 83 S. W., 657, that great weight should be given to the decisions of New York.

In this case the complainant bank received and paid the check, thereby admitting the check to be correct, and held it for thirty days or more, and it is precluded and estopped to deny the genuineness of the signature, or to avoid the effect of its act in accepting the check and paying it.

The indorser of a check does warrant and guaranty the genuineness of the check to all subsequent holders in due course; but the drawee is not a holder in due course.

A holder in due course is defined, in section 52, p. 150, of the negotiable instrument act (Acts 1899, c. 94), and the definition does not embrace the case of a drawee.

A holder means a payee or indorsee who is in possession, or the bearer. Acts 1899, p. 139, c. 94.

The drawee, when he accepts the check, makes himself the guarantor thereof.

The liability of an indorser only arises when the necessary proceedings on dishonor are taken; but this feature of the law is not presented in this case.

Without commenting further upon the several points raised by counsel, we are of opinion that the complain-

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ant bank has no right in law, or in equity and good conscience, to recover from the defendant bank the amount of this check, and the chancellor was in error; and his decree is reversed, and the suit is dismissed, at cost of complainant.

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DAN HOBSON *et al.* v. H. C. MOORMAN.

(*Jackson.* April Term, 1905.)

WILLS. Admissibility of testator's previous declarations to show incapacity and susceptibility to extraneous influences, but not to prove fact of undue influence.

Where a will is sought to be impeached, or the probate thereof is resisted, on the ground of undue influence and testamentary incapacity, the declarations of the testator made previous to the execution of the will, while admissible to show his mental incapacity and susceptibility to extraneous influences, are inadmissible as substantive evidence to prove the fact of undue influence.

Cases cited, distinguished, and approved: *Brown v. Moore*, 6 Yer., 272; *Patton v. Allison*, 7 Hum., 320; *Smiley v. Gambill*, 2 Head, 164; *Demonbreun v. Walker*, 4 Bax., 199; *Beadles v. Alexander*, 9 Bax., 604; *Linch v. Linch*, 1 Lea, 526; *Maxwell v. Hill*, 89 Tenn., 584; *Peery v. Peery*, 94 Tenn., 328; *Kirkpatrick v. Jenkins*, 96 Tenn., 85; *Earp v. Edgington*, 107 Tenn., 31; *Throckmorton v. Holt*, 180 U. S., 552, 45 L. Ed., 663; *Shaller v. Bumstead*, 99 Mass., 122; *Rusling v. Rusling*, 36 N. J. Eq., 603, 607; *Calkins v. Calkins*, 112 Cal., 296; *Donovan's Estate*, In re., 140 Cal., 390; *Jones v. Grogan*, 98 Ga., 552; *Bevelot v. Lestrade*, 153 Ill., 625; *Yorty v. Webster*, 205 Ill., 630; *Griffith v. Diffenderfer*, 50 Md., 466; *Middleditch v. Williams*, 45 N. J. Eq., 726; *Wiltsey's Will*, In re, 122 Iowa, 423; *Waterman v. Whitney*, 11 N. Y., 157; *Herster v. Herster*, 122 Pa., 239; *Townsend's Estate*, In re, 122 Iowa, 246; *Power's Ex'r v. Powers* (Ky.), 78 S. W. 152; *Marx v. McGlynn*, 88 N. Y., 357, 374; *Meeker v. Boylan*, 28 N. J. Law, 274; *Bush v. Bush*, 87 Mo. 480; *Pemberton's Case*, 40 N. J. Eq., 520; *McConnell v. Wildes*, 153 Mass., 487; *Eastis v. Montgomery*, 95 Ala., 486; *Ormsby v. Webb*, 134 U. S., 47, 33 L. Ed., 805.

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FROM FAYETTE.

Appeal from the Circuit Court of Fayette County.—
R. E. MAIDEN, Judge.

BULLOCK & TIMBERLAKE and CHAS. A. STAINBACK, for
Hobson.

T. K. RIDDICK, T. J. FLIPPIN, WM. M. MAYO, and C.
W. CRAWFORD, for Moorman.

MR. JUSTICE McALISTER delivered the opinion of the
Court.

This is an issue of *devisavit vel non* from the circuit court of Fayette county. The will in controversy was executed by Mrs. Jane B. George, on the 23d day of October, 1899, and is attacked upon the ground of undue influence and want of testamentary capacity. The contestants are Lizzie Hobson, John D. Boyd, and Harry Boyd, family servants of the testatrix, and legatees under a prior will executed on the 29th day of June, 1898. The proponent of the present will is H. C. Moorman, who was appointed administrator *cum testamento annexo*. The case has been tried several times in the circuit court and once in this court, at the April term, 1902. On the first trial in the circuit court, Jan-

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uary term, 1901, a verdict was rendered against the validity of the will. A new trial was granted as to the beneficiaries in said will, except Mrs. Goosman; but as to her a new trial was refused, upon the ground that the evidence showed that she had exercised an undue influence over the testatrix in procuring a testamentary benefit. On the second trial at the May term, 1901, the validity of the will was sustained as to the remaining beneficiaries. On appeal to this court, the judgment below was reversed and the cause remanded, upon the ground that the paper writing was indivisible, and there should be a new trial touching the validity of the entire instrument. On the remandment the case was again tried at the March term, 1903; the jury disagreeing and a mistrial being entered. The last trial, in November term, 1904, resulted in a verdict sustaining said paper writing as the last will and testament of Mrs. Jane B. George. The contestants appealed and have assigned numerous errors. As already stated the will in controversy was executed on the 23d day of October, 1899, and is as follows:

“I, Jane B. George of Somerville Tennessee, do make and publish this as my last will and testament, hereby revoking and making void all others by me at any time made.

“First—I direct that my funeral expenses and all debts, if any I owe, be paid as soon after my death as possible, out of any money that I may die possessed of.

“Second—I will, devise and bequeath to George

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Gossman, of Somerville, Tennessee, one thousand dollars in money.

"Third—I will, devise and bequeath all the balance of my property, real, personal and mixed, of every character and description, wherever situated, to the following named persons, to wit: To Mrs. Lizzie Riley, John H. McElwee, Louis McElwee, Mrs. Mattie F. Goosman, the children of Mrs. Emmaline Ervin and the children of Jerome McElwee, the children of each taking one share, it being my intention that my entire estate, after paying burial expenses and debts and legacy provided for in item second, shall be equally divided, share and share alike, among the persons named, that is, one share to Mrs. Lizzie Riley, one share to John H. McElwee, one share to Louis McElwee, one share to Mrs. Mattie F. Goosman, one share to the children of Mrs. Emmaline Ervin, one share to the children of Jerome McElwee, thus making six equal shares.

"Fourth—I do not appoint any executor; the court can appoint some one to execute this will and require proper bond and security.

"In witness whereof, I do, to this, my will, set my hand, this 23d day of October, 1899.

"JANE B. GEORGE.

"Signed and published in our presence, and we have subscribed our names hereto, as witnesses, at the request of the testatrix, in her presence and in the presence of each other.

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"This Oct. 23rd, 1899.

"H. C. MOORMAN.

"WM. B. GRANBERRY."

This latter will was essentially different from the first will, executed on the 29th of June, 1898. In the first will, the testatrix devised to her nephew, John Harvey McElwee, all her real estate and household goods, together with a specific legacy of \$4,500, and he was also made residuary legatee. The last will devised to him an undivided one-sixth interest in the estate. In the first will the testatrix bequeathed to Lizzie Hobson a legacy of \$250, while under the last will she was entirely excluded. John D. Boyd and Harry Boyd, under the first will, were bequeathed the interest on \$250 each annually, while the last will gave them nothing. In the first will Rev. J. F. Lloyd was left a legacy of \$250, while he is not mentioned at all in the last will. The first will gave to Mrs. Lizzie Riley, niece of the testatrix, \$1. Under the last will she takes an undivided one-sixth interest in the estate, after deducting the legacy to George Goosman. Louis McElwee, a nephew under the first will was given the sum of \$1, while under the last will he takes an undivided one-sixth interest in the estate, after deducting the legacy. Under the first will the testatrix made no bequest whatever to Mrs. Mattie Goosman, while under the last will she is given an undivided one-sixth interest in the estate, after deducting the legacy given to her son George. The first will gave to Jimmie and Lizzie Ervin, children of Em-

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maline Ervin, a legacy of \$500 each, while the last will gives them an undivided one-sixth interest in the estate, after deducting George Goosman's legacy. In the first will John Harvey McElwee was nominated executor to act without bond, while no appointment of an executor is made in the last will.

These are the cardinal and differential features of the two wills. It is said in the brief of counsel for the proponent, that the real contestant of the present will is John Harvey McElwee, although nominally Lizzie Hobson and John and Harry Boyd, legatees and family servants of the testatrix, are the contestants of record, who are prosecuting this appeal in *forma pauperis*. The theory of contestants is that the will executed on the 29th of June, 1898, was the real testamentary act of the testator, executed while in the possession of all of her intellectual faculties and entirely removed from any dominating influences. It is said that, in executing the first will, she took counsel of her spiritual adviser, Rev. J. F. Lloyd and of her regular attorney, Hon. E. R. Scruggs.

But it is further said that, shortly after the execution of the codicils to the first will, in April and September, 1899, Mrs. George sustained a very serious fall, which confined her to her bed, and that while so prostrated she fell under the influence of Mrs. Goosman, Mrs. Riley, and others, who induced her to make the second will, which did not represent her testamentary wishes, but in reality was the testament of those exerting this

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undue influence. It is, moreover, contended that when the first will was executed Mrs. George was of sound mind and disposing memory, while at the date of the execution of the second will she was in a state of senile dementia, which rendered her incapable of performing a testamentary act.

On the other hand, the theory of the proponent is thus stated in the language of his counsel, which we quote from his brief as follows:

"Up to June, 1898, Mrs. George had intended to bequeath her property to Mrs. Goosman, her son, George Goosman, and to the nieces and nephews of Mrs. George herself. Mrs. Goosman was the second cousin and adopted daughter of Mrs. George. Their relations were as intimate and friendly as they could have been, until June, 1898, when Mrs. George was led to believe that Mr. and Mrs. Goosman tried to poison her in order to get her property. Under the influence of this belief, she made a will, on June 29, 1898, disposing of her property in an entirely different way from what she had previously contemplated. There is no pretense that this belief was well founded, but Mrs. George persisted in it for several months. Proponent's theory is that she was encouraged in this belief by Mrs. Hazlewood, Lizzie Hobson, and John Harvey McElwee, but they deny it. Early in the year 1899, however, she became convinced that she had been poisoned, and immediately began to change her will. She added one codicil in April, 1899, and one in September, 1899. These cod-

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icils changed the will so much that, to use her own expression, she 'hardly knew what was in it.' So she finally resolved to make a new will altogether, which she did on October 23, 1899. This contained practically the same disposition of her property which she intended to make prior to the poisoning episode, and is the will now under contest."

We shall not, at this point, enter upon an examination of the evidence in support of these respective theories, but will have occasion, in the consideration of the assignments of error on the admission and exclusion of evidence, to make an additional statement of the facts. We will say, however, that our examination of the record has satisfied us that the verdict of the jury and the judgment of the court is supported by material evidence.

The first assignment of error made by contestants is based upon the action of the trial judge in excluding evidence of the declarations of the testatrix, made prior to the execution of the will in issue, for the purpose of establishing undue influence. On this subject the court charged the jury as follows:

"Gentlemen of the jury, during the progress of this trial the court permitted the parties to introduce proof of declarations alleged to have been made by Mrs. George both previous and subsequent to the execution of the will in controversy, and the court has already said to you that, if you find independent and substantive evidence in this case of undue influence, you might

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look to these previous and subsequent declarations of Mrs. George, along with the other proof in the case, for the purpose of determining what the condition of her mind was at the time she performed the alleged testamentary act, and the court now instructs you especially that you cannot look to and consider any declarations made by Mrs. George, previous or subsequent to the execution of the will in controversy, as evidence of undue influence. Such declarations—that is to say, declarations made by Mrs. George before or subsequent to the execution of the will in controversy—are not evidence of undue influence, and cannot be looked to and considered by you for that purpose; but, if you find independent evidence of undue influence in this case, then you may look to such declarations along with all other proof in the case, for the purpose of determining the condition of Mrs. George's mind at the time it is alleged she executed the will in question, as I have already instructed you, but such declarations are only competent for this purpose."

As illustrating the effect of the charge of the court in excluding evidence of previous declarations on the part of the testatrix, counsel for contestants have formulated the following propositions, viz.:

"(1) The hostile feelings of testatrix for Mrs. Goosman and her intention to exclude her from any testamentary disposition, evidenced by her declarations to third parties, her letters, and the first will, were competent and material facts to be considered as directly bearing upon the issue of undue influence; that is to say,

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whether the change in the will in issue from the previously expressed feelings and intention of testatrix was attributable to the volition of the testatrix or to the exercise of an undue influence.

"(2) That the affection of testatrix for J. H. McElwee, and her intention to make him the main object of her bounty, evidenced by her declarations to third parties, her letters, the first will, and memorandum prepared for draft of the same, were competent and material facts to be considered as directly bearing upon the issue of undue influence; that is to say, whether the change in the will in issue from the previously expressed feelings and intentions of the testatrix was attributable to the volition of testatrix or an undue influence.

"(3) That the feelings and testamentary intentions of testatrix towards Lizzie Riley and Louis McElwee, and her reasons therefor, evidenced by her declarations to third parties, the first will, and said memorandum, were competent and material facts to be considered as directly bearing upon the issue of undue influence; that is to say, whether the change of feeling and intention indicated in the will in issue from the previous intentions and feelings of testatrix was attributable to the volition of testatrix or an undue influence.

"(4) That the feelings and testamentary intentions of testatrix toward her minister and family servant, evidenced by her declarations to third parties, the said first will, and said memorandum, were for the reasons

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before indicated competent and material facts to be considered upon the issue of undue influence.

“(5) That the state of mind of testatrix as to the disposition of her property at the time of the execution of her first will—that is, her intention to make her nephew her main beneficiary in her first will, in consideration of his taking charge, in her old age, of her affairs—is a material and competent fact bearing directly upon the issue of undue influence; that is to say, whether her failure to keep her promise and her radical change from her intentions to do so are attributable to her volition or an undue influence.

“(6) That testatrix’s state of mind, with regard to Mrs. Goosman having a power or influence over her she could not resist, was a competent and material fact to be considered as directly bearing upon the issue of undue influence; that is to say, it was a material fact which the jury might consider, in view of the radical changes, indicated by the last will, from the previously expressed feelings and intentions of testatrix, as tending to show the last will was not of the volition of testatrix, but the result of undue influence.

“Also, the same was competent and material to show that testatrix’s mind was easily or readily susceptible to the influence and control of Mrs. Goosman.

“(7) That the declarations of Mrs. George, to the effect that Mrs. Goosman was intimidating her and endeavoring to get her to make another will, were com-

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petent and material evidence to be considered as bearing directly upon the question of undue influence."

It will be observed, from a careful examination of the foregoing propositions, that the majority of them proceed upon the idea that the trial judge excluded the declarations of testatrix, tending to show her feelings, testamentary purposes, intentions, etc. This is a misconception of the action of the trial judge. On this subject the trial judge charged the jury as follows:

"You may also look to and consider her declarations and statements at the time of the alleged testamentary act and drafting of said alleged will, if she made any, as well as all her declarations and statements, both subsequent and prior to the execution of the will, as to her intentions as to her property and her kinsmen, etc., etc., whether friendly or unfriendly, as well as to any previous will or wills which she may have made, as expressive of her then purpose and intention.

An examination of the record will show that a very wide scope was given to the introduction of the declarations of the testatrix as evidence, and that they were held competent by the circuit judge in his instructions to the jury for every purpose, except to establish the fact of undue influence.

The cardinal inquiry presented upon the first assignment of error is whether as a matter of law such declarations were competent as substantive evidence of undue influence. It is conceded on the brief of counsel for contestants that subsequent declarations are not competent

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evidence to establish undue influence. The law on this subject is well settled in this State. *Peery v. Peery*, 94 Tenn., 328, 29 S. W., 1; *Earp v. Edgington*, 107 Tenn., 31, 64 S. W., 40. But the contention now made is that there is a difference in principle between declarations of the testatrix, made prior to the execution of the will, and those subsequently made. Hence it is earnestly insisted that, while the evidence of subsequent declarations has been uniformly rejected, proof of prior declarations, tending to establish the fact of undue influence, have been received in this State. It will be useful at this point to review our decisions on this subject, at least so far as they are claimed by contestants to support the propositions now propounded. The first case referred to is that of *Brown v. Moore*, 6 Yerg., 272. In that case it appeared that on the trial in the circuit court the contestants offered to prove that James Langford, devisee in the will, acknowledged that undue influence was exercised to induce the making of the will, and that forged letters were read to testator by the devisees, before the making of the will, to exasperate him against his other children, who were disinherited. The court below rejected this testimony; but, on appeal, this court held that said evidence was competent. This case did not involve proof of declarations on the part of testator tending to show undue influence. It appeared from the record that the testator had long spoken of his intention to give his estate to his son, William Moore, and of excluding those whom he disinherited from any

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participation in his estate. But this latter proof was in conformity with the well-recognized rule that proof of testamentary intentions and purposes on the part of the testator may be shown by his declarations.

The next case cited is that of *Patton, Executor, v. Allison*, 7 Humph., 320. In that case it was merely held that previous declarations of the testator, in conformity with his will, are admissible for the purpose of showing knowledge on his part of the contents of his will. It was intimated in that case that declarations of the testator, of a contrary character, were also admissible; but this point was not decided and did not arise in the record, and the language of the court was obiter.

The next case cited is *Smiley v. Gambill*, 2 Head, 164, wherein it was held that the revocation of a will is a question of intention, and the acts, conduct, and declarations of the maker of the will are admissible for the purpose of ascertaining whether it was revoked. *Demonbreun v. Walker*, 4 Baxt., 199, simply holds that written declarations of the testator are competent to show his intentions as to the disposition of his property. In that case a paper purporting to have been executed as a will, years anterior to the date of the will in contest, was held competent for this purpose.

In *Maxwell v. Hill*, 89 Tenn., 584, 15 S. W., 253, it was held that the testator's declarations, whether made before or after the execution of his will, with reference to the dispositions he proposed to make, or had made, of his property, are competent evidence to show whether

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or not he fully comprehended and approved the will as written.

The case of *Beadles v. Alexander*, 9 Baxt., 604, held that subsequent declarations of the testator were competent to show that the testator had in fact signed his will in the presence of both of the subscribing witnesses.

The case of *Linch v. Linch*, 1 Lea, 526, approved the rule announced in *Beadles v. Alexander*, supra. In the *Linch Case* the question of undue influence was probably the main issue. The trial judge had instructed the jury as follows: "When you come to consider the question of undue influence, the declarations of the testator in reference to his will cannot be considered by you, unless they were made at the time the will was written, or executed, or republished, in the presence of attesting witnesses, or declarations to or in the presence of his wife." This court held the charge erroneous, and referred to the case of *Beadles v. Alexander*, supra, as having settled the law to the contrary. It does not appear, from the published opinion in that case, what was the character of the declarations sought to be introduced, whether antecedent or subsequent to the execution of the will.

The next case cited is *Peery v. Peery*, 94 Tenn., 328, 29 S. W., 1. The will in that case was attacked because of undue influence and mental infirmity of the testator. The point ruled was that subsequent declarations of the testator that he had to make the will as he did to have peace at home are admissible to show his mental

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condition at the time of the execution of the will, but not to show undue influence. If there be other evidence of undue influence, then such declaration could be looked to to determine the effect which such influence had upon the testator, but not to prove the substantive fact of undue influence. The admissibility of antecedent declarations was not involved or determined. The next case cited is *Kirkpatrick v. Jenkins*, 96 Tenn., 85, 33 S. W., 819. It involved an issue of *devisavit vel non*, and the contest was based on the want of mental capacity and undue influence. Said the court, through Judge Caldwell, viz.: "Though the cases are not harmonious, we think the great weight of authority and reason is to the effect that subsequent declarations of an alleged testator may be considered by the jury upon an issue of mental incapacity, but that they cannot be considered by the jury upon an issue of undue influence, unless there be independent proof indicating the presence of undue influence, and then only to show a condition of mind susceptible to such influence and the effect thereof upon the testamentary act." No question arose in that case in respect of the competency of antecedent declarations as primary evidence of undue influence. The last case in which the question of declarations was considered by this court is that of *Earp v. Edgington*, 107 Tenn., 31, 64 S. W., 40. There was no question of antecedent declarations, but the ruling of the court related to subsequent declarations, holding them to be incompetent. The court

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cited with approval the opinion of Justice Peckham, in *Throckmorton v. Holt*, 180 U. S., 552, 21 Sup. Ct., 474, 45 L. Ed., 663, in which it was said, viz.: "The declarations are purely hearsay, being merely unsworn declarations, and, when no part of the *res gestae*, are not within any of the recognized exceptions admitting evidence of that kind. Although in some of the cases the remark is made that declarations are admissible which tend to show the state of the affections of deceased as a mental condition, yet they are generally stated in cases where the mental capacity of the deceased is the subject of the inquiry, and in these cases his declarations on that subject are just as likely to aid in answering the question as to mental capacity as those upon any other subject. But, if the matter in issue be not the mental capacity of the deceased, then such unsworn declarations, as indicative of the state of his affections, are no more admissible than would be his sworn declarations as to any other fact."

In the *Throckmorton Case*, Justice Peckham, after citing the authorities on both sides of the question, said: "After much reflection upon the subject, we are inclined to the opinion that not only is the weight of authority with the cases which exclude the evidence both before and after the execution, but the principles upon which our law of evidence is founded necessitate that exclusion." In the present case the will is sought to be impeached, both on account of undue influence and for want of testamentary capacity.

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Mr. Wigmore, in his exhaustive treatise on the Law of Evidence (volume 3, section 1734), divides the declarations of a testator into seven different classifications, and states that in using any of these it is essential to keep in mind (1) what is the fact which the utterance is offered to evidence; (2) whether this fact is relevant, and in what way; (3) supposing it to be relevant, whether the utterance is admissible to evidence it. Under the fifth classification the author considers declarations that a particular will was procured by fraud or undue influence. At section 1738 the author treats this subject as follows:

"Utterances of the fifth and sixth classes, already enumerated, may be regarded in several aspects. The chief distinction is between their use as direct assertion of the fact of fraud or undue influence, for here they are met immediately by the hearsay rule, and their use as indicating directly or indirectly a condition of mind relevant to the issue, for here they are admissible either as circumstantial evidence or as statements of a mental condition under the present exception.

"The testator's assertion that a person named or unnamed, has procured him, by fraud or by pressure, to execute a will, or to insert a provision, is plainly obnoxious to the hearsay rule, if offered as evidence that the fact asserted did occur.

"1868, Colt, J., in *Shailer v. Bumstead*, 99 Mass., 122: 'When used for such purpose, they are mere hearsay, which, by reason of the death of the party whose

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statements are so offered, can never be explained or contradicted by him. Obtained, it may be, by deception or persuasion, and always liable to the infirmities of human recollection, their admission for such purpose would go far to destroy the security which it is essential to preserve.' They are thus inadmissible, so far as they form 'a declaration or narrative to show the fact of fraud or undue influence at a previous period.' * * *

"But these utterances may be nevertheless availed of as evidence of the testator's mental condition, if the latter fact is relevant. Though the issue is as to his mental condition, with regard to deception or duress at the time of execution, yet his mental state, both before and afterwards, is admissible as evidence of his state at that time (on the principles of sections 230, 242, 394, 395, ante). Thus the question is reduced to a simple one, namely, what particular mental conditions of the testator, thus evidenced, are material as being involved in the broader issue of deception or undue influence? There are here recognized by the courts two distinct sorts of mental condition.

"The existence of undue influence or deception involves incidentally a consideration of the testator's incapacity to resist pressure and his susceptibility to deceit, whether in general or by a particular person. This requires a consideration of many circumstances, including his state of affections or dislike for particular persons benefited or not benefited by the will, of his inclinations to obey or to resist these persons, and, in

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general, of his mental and emotional condition, with reference to its being affected by any of the persons concerned. All utterances and conduct, therefore, affording any indication of this sort of mental condition, are admissible, in order that from these the condition at various times not too remote may be used as the basis for inferring his condition at the time in issue. This use of such data is universally conceded to be proper.

"1883, Dixon, J., in *Rusling v. Rusling*, 36 N. J. Eq., 603, 607: 'When undue influence is set up in impeachment of a will the ground of invalidity to be established is that the conduct of others has so operated upon the testator's mind as to constrain him to execute an instrument to which of his first will he would not have assented. This involves two things: First, the conduct of those by whom the influence is said to have been exerted; second, the mental state of the testator, as produced by such conduct, which may require a disclosure of the strength of mind of the decedent and his testamentary purposes, both immediately before the conduct complained of and while subjected to its influence. In order to show the testator's mental state at any given time, his declarations at that time are competent, because the conditions of the mind are revealed to us only by its external manifestations, of which speech is one. Likewise the state of mind at one time is competent evidence of its state at other times not too remote, because mental conditions have some degree of

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permanency. Hence, in an inquiry respecting the testator's state of mind, before or pending the exertion of the alleged influence, his words, as well as his other behavior, may be shown for the purpose of bringing into view the mental condition which produced them, and, through that, the antecedent and subsequent conditions. To this extent his declarations have legal value. But, for the purpose of proving matters not related to his existing mental state, the assertions of the testator are mere hearsay. They cannot be regarded as evidence of previous occurrences, unless they come within one of the recognized exceptions to the rule excluding hearsay testimony.' "

Mr. Elliott, in his work on Evidence (volume 1, secs. 5333), says: "Declarations of a testator are received to corroborate direct testimony as to a will alleged to be a forgery or to have been executed under undue influence or force," etc., ". . . and in cases where fraud is the issue the statements of the testator are often admissible as declarations of a state of mind. So, also, in cases of undue influence. But such declarations are admitted to show a condition or state of mind, rather than to show undue influence of themselves. And in most jurisdictions there must be some other evidence of undue influence before they would be admitted as against the will."

Mr. Elliott, again, in volume 3, secs. 2494, writes, viz:

"Where declarations are narrations by the testator of past events, they are generally hearsay, and are not

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competent for this reason, even though the events narrated constitute acts of undue influence. But declarations made at the time of the execution of the will may be admissible as part of the *res gestae*, or declarations at other times may be admissible as the best evidence of a particular fact, in some instances, or to show the testator's motives and state of mind. Declarations at other times will not, however, usually be entitled to consideration upon the question of undue influence, unless there is other evidence in that direction"—citing *Calkins v. Calkins*, 112 Cal., 296, 44 Pac., 577; *Donovan's Estate, In re*, 140 Cal., 390, 73 Pac., 1081; *Jones v. Grogan*, 98 Ga., 552, 25 S. E., 590; *Bevelot v. Les-trade*, 153 Ill., 625, 38 N. E., 1056; *Yorty v. Webster*, 205 Ill., 630, 68 N. E., 1068; *Griffith v. Diffenderffer*, 50 Md., 466; *Shailer v. Bumstead*, 99 Mass., 112; *Middleditch v. Williams*, 45 N. J. Eq., 726, 17 Atl., 826, 4 L. R. A., 738; *Wiltsey's Will, In re*, 122 Iowa, 423, 98 N. W., 294; *Waterman v. Whitney*, 11 N. Y., 157, 62 Am. Dec., 71; *Herster v. Herster*, 122 Pa., 239, 16 Atl., 342, 9 Am. St. Rep., 95; *Kirkpatrick v. Jenkins*, 96 Tenn., 85, 33 S. W., 819. So held, whether made before or after. *Townsend's Estate, In re*, 122 Iowa, 246, 97 N. W., 1108. But see *Powers' Ex'r v. Powers* (Ky.), 78 S. W., 152; *Marx v. McGlynn*, 88 N. Y., 357; *Griffith v. Diffenderffer*, 50 Md., 466; *Waterman v. Whitney*, 11 N. Y., 157, 62 Am. Dec., 71; *Meeker v. Boylan*, 28 N. J. Law, 274.

The author then considers the admissibility of subse-

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quent declarations and concludes the section as follows:

“In short, a testator’s declarations, whether made before or after the execution of the will, aside from the time of execution itself, are admissible chiefly to show his mental condition or the real state of his affections; and they are received, rather as his own external manifestations, than as evidence of the truth or untruth of facts relative to the exertion of undue influence upon him. They may corroborate, but the issue calls for its own proof from the living. And the more remote such declarations from the time when the will was executed, the less becomes their value. Declarations impertinent to the issue, moreover, are not admissible at all”—citing *Bush v. Bush*, 87 Mo., 480; *Middle-ditch v. Williams*, 45 N. J. Eq., 726, 17 Atl., 826, 4 L. R. A., 738; *Herster v. Herster*, 122 Pa., 239, 16 Atl., 342, 9 Am. St. Rep., 95; *Pemberton’s Case*, 40 N. J. Eq., 520, 4 Atl., 770; *McConnell v. Wildes*, 153 Mass., 487, 26 N. E., 1114; *Eastis v. Montgomery* (Ala., 1891), 95 Ala., 486, 11 South., 204, 36 Am. St. Rep., 227; *Ormsby v. Webb*, 134 U. S., 47, 10 Sup. Ct., 478, 33 L. Ed., 805.

In *Marx v. McGlynn and Others*, 88 N. Y., 374, Earl, J., held that diaries kept and letters written by a testator, either before or after the execution of the will, while proper evidence, as bearing upon the mental capacity, and the condition of mind of the testator, with reference to the object of his bounty, are not competent

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evidence of the facts stated in them, or to prove fraud or undue influence. The court said: "They are in the nature of hearsay evidence, declarations of the deceased, which are incompetent for the purpose of defeating or destroying the will or any of its provisions. They are competent only as bearing upon the condition of mind of the testatrix, at the time of the execution of the will. Such memoranda or declarations, whether made before or after the execution of the will, are competent as bearing upon the testator's mental capacity. They are also competent as bearing upon the condition of the testator's mind, with reference to the objects of his bounty. They may be given in evidence for the purpose of showing his relations to the people around him, and to the persons named in his will as beneficiaries. They are, however, entitled to no weight, in proving external acts, either of fraud or undue influence."

Now, recurring to the charge of the court in the present case, we have already seen that his honor distinctly instructed the jury that they might look to the previous and subsequent declarations of Mrs. George, along with all the other proof in the case, for the purpose of determining what the condition of her mind was, at the time she performed the alleged testamentary act. The authorities already cited announce this rule so distinctly charged by the trial judge.

It is insisted, however, that he erred in his instruction that they could not look to these declarations as substantive evidence of undue influence, or, as he ex-

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pressed it in another place, "such declarations could not be regarded as evidence of or as proving the fact of undue influence."

This review of the authorities satisfies us that the weight of opinion both of the text-writers and appellate courts is against the admission of ante-testamentary declarations to establish the fact of undue influence, and we are of opinion this is the correct rule. But it is insisted on behalf of the contestants, that there are at least two cases in this state in which this court has affirmed the contrary of this view. The case mainly relied on is *Linch v. Linch*, 1 Lea, 526; but, as already stated, the reported opinion of the court does not affirmatively show that any antecedent declarations were involved, or their admissibility as primary evidence of undue influence adjudged. In that case the court referred to *Beadles v. Alexander*, 9 Baxt., 604, as a precedent controlling its decision. An examination of *Beadles v. Alexander*, demonstrates that no antecedent declarations were involved, but that it related alone to declarations made by the testator, subsequent to the execution, to establish the fact that he had signed the will in the presence of the attesting witnesses.

We are also referred to the case of *Persons, Adm'r, v. Hill*, Shelby Law, decided at the April term, 1898, Jackson, as holding in favor of the admissibility of previous declarations. There is no opinion or memorandum of the court extant, indicating the precise ground upon which that case was decided, and it does

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not affirmatively appear that the point for which it is now cited as a precedent, was adjudicated at all.

This question has been much mooted in the courts of very many of the States, but has never been distinctly decided in this State, so far as we are apprised by any reported opinion.

In our opinion, the great weight of authority confirms the rule, announced by the circuit judge in his instructions to the jury, that such previous declarations are always admissible for the purpose of illustrating the mental capacity of the testator and his susceptibility to extraneous influence, and also to show his feelings, intentions, and relations to his kindred and friends, but such declarations are not admissible as substantive evidence of undue influence.

The remaining assignments of error have all been considered in a written memorandum, but in the opinion of the court none of them are well taken. The main questions debated at the bar are considered in this written opinion, and for the reasons herein stated the judgment of the circuit court is affirmed.

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WESTERN UNION TELEGRAPH COMPANY v. W. F.
M'CAUL.*(Jackson. April Term, 1905.)*

1. **TELEGRAMS.** No damages for father's mental anguish and grief for burial of son in a strange place in consequence of negligence in delivery of message.

There can be no recovery against a telegraph company by a father for mental anguish and grief sustained by him in being forced to bury the remains of his son in a strange place, in consequence of such company's negligent delay in delivering a message requesting the transmission of money to enable him to convey the corpse home for burial. (*Post*, pp. 101-103.)

Cases cited and approved: Telephone Co. v. Arnold (Tex. Sup.), 73 S. W., 1043; Telegraph & Telephone Co. v. Gotcher (Tex. Sup.), 53 S. W., 686; Telegraph Co. v. Edmondson (Tex. Sup.), 42 S. W., 549.

2. **SAME.** Same. Measure of damages in such case is cost of disinterring and reintering the body.

It is conceded by counsel for the telegraph company, and the court seems to coincide, that the proper measure of damages in the case stated in the foregoing headnote is the cost and expense of disinterring and reintering the body at the place originally desired. (*Post*, p. 104.)

3. **SAME.** Addressed to a person as at a certain town is not bound to be delivered at residence in country without such undertaking, when.

Where a telegram addressed to an individual as at a certain town is received by the transmitting operator of the telegraph company without knowledge of the fact that the addressee lived in the county near such town, and without any agreement, ex-

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press or implied, on the part of the company to deliver the message at the addressee's residence in the country, the company is not legally bound to deliver the message at the residence of the addressee, and is only bound to deliver it to the addressee in such town, if to be found there at that time. (*Post*, pp. 101, 104, 106.)

4. **SAME. Same. Delivery to person in whose care addressed, and not to his wife or other members of his family.**

Where a telegram is addressed to one person as at a certain town, though living in the country near by, and in the care of another person living in said town, without more, it is the duty of the telegraph company, in the absence of the real addressee, to deliver the message to the person in whose care it was addressed alone, and not to his wife or any other member of his family. (*Post*, pp. 101, 104-107.)

Cases cited and approved: *Telegraph Co. v. Mitchell* (Tex. Sup.), 44 S. W., 274, 40 L. R. A., 209, 66 Am. St. Rep., 920; *Telegraph Co. v. Moseley* (Tex. Civ. App.), 67 S. W., 1059; *Telegraph Co. v. Houghton* (Tex. Sup.), 17 S. W., 846, 15 L. R. A., 129, 27 Am. St. Rep., 918; *Telegraph Co. v. Hendricks* (Tex. Civ. App.), 68 S. W., 720; *Telegraph Co. v. Cobb* (Tex. Sup.), 67 S. W., 87, 58 L. R. A., 698, 98 Am. St. Rep. 862; *Telegraph Co. v. Redinger* (Tex. Civ. App.), 68 S. W., 156; *Davies v. Steamboat Co.* (Me.), 47 Atl., 896, 53 L. R. A., 239.

5. **SAME. Same. Same. Delivery to wife of person in whose care addressed is not actionable negligence where its delivery to real addressee was thereby hastened.**

But where a telegram addressed as stated in the foregoing head-note was delivered to the wife of the person in whose care it was addressed, in his absence and while beyond the delivery limits, and in the absence of the real addressee, and it is by her immediately forwarded to the real addressee and its reception hastened thereby, the telegraph company is guilty of no actionable negligence in such delivery. (*Post*, pp. 106, 107.)

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FROM GIBSON.

Appeal from the Circuit Court of Gibson County.—
JOHN R. BOND, Judge.

DEASON, RANKIN & ELDER, for Telegraph Co.

HARWOOD & WADE, and W. W. POWERS, for McCaul.

MR. JUSTICE SHIELDS delivered the opinion of the Court.

W. F. McCaul brings this action to recover damages for the grief and anguish sustained by him in consequence of the delay in receiving an answer to a telegram sent by him over the wires of the defendant from Sikeston, Mo., to Trenton, Tenn., addressed to Mrs. M. C. McCaul, care of Joe Knox, in these words:

“Send me fifty dollars at once. Hugh is dead.”

W. F. McCaul was at Sikeston, Mo., where his son Hugh had just died, and desired \$50 to bring his remains to Tennessee for interment. Joe Knox resided in Trenton, and Mrs. M. C. McCaul, in the country, three miles distant.

The telegram was delivered to the agent of the company by the sender at Sikeston, addressed as stated.

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The fact that Mrs. McCaul lived in the country was not disclosed to the agent of the company at that place. The agent at Trenton, who knew all the parties, received the message at 9:30 o'clock in the morning, and knowing that Mrs. McCaul did not live within the delivery of his office, sent it out to be delivered to Joe Knox, in whose care it was addressed. The messenger inquired for him at his usual place of business, and was reliably and correctly informed that he had gone to the country, and would not return for some time, and the message was then returned to the office. About 12 o'clock of the same day, it was again sent out and delivered to Mrs. Joe Knox, at the residence of her husband, and she immediately forwarded it to Mrs. McCaul. Joe Knox returned from the country at 1:30 o'clock that evening, and later receiving directions from Mrs. McCaul to do so, had \$50 wired the plaintiff, as requested by him, but the latter did not receive notice of the fact until after the burial of his son on the succeeding day.

The negligence averred is two and one-half hours' delay in delivery at Trenton, resulting in the failure of the plaintiff to receive the money until after the burial of his son upon the next day.

There was a verdict and judgment for \$300 against the plaintiff in error, and it has appealed and assigns a number of errors, only three of which it will be necessary to notice.

1. The first assignment is predicated upon the action of the trial judge in instructing the jury that the plain-

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tiff in that court was entitled to recover damages for the mental anguish and grief sustained by him, if any, by the delay in receiving the money for which he wired to bring the body of his son to his home in Tennessee for burial, and in having to bury him away from home and in a strange place, and in refusing to charge that the proper measure of damages in this case was the cost and expense of exhuming and reinterment in Tennessee. It must be sustained. This court has held that parties injured could recover damages for mental anguish and grief sustained by them in being denied the privilege of attending to the bedside of near relatives during their last hours, of superintending the preparations of their bodies for interment, and of being present at their burial; but in no other cases. The rule upon which such damages are allowed is of difficult application, and its policy and soundness has been questioned in many courts of high authority, and we do not deem it proper to extend it to other cases than those to which it has been applied in this State. This also seems to be the tendency of other courts of last resort in States where the mental anguish doctrine prevails. *Telephone Co. v. Arnold* (Tex. Sup.), 73 S. W., 1043; *Telegraph & Telephone Co. v. Gotcher* (Tex. Sup.), 53 S. W., 686; *Telegraph Co. v. Edmondson* (Tex. Sup.), 42 S. W., 549.

The mental anguish claimed here is not for failure to reach the son of the plaintiff before his death, or for loss of the privilege of attending his funeral, but for de-

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lay in the reception of money with which to bring the body to the home of the father for burial. This is a right and a privilege that can yet be exercised in every respect to the fullest gratification of the desire of the father. It would seem, therefore, that the proper measure of damages would be as insisted upon by the company. Ordinarily the damages which one is entitled to recover for delay in the reception of money is simply the interest for the period of the delay.

2. It is further assigned as error that the trial judge declined to instruct the jury when seasonably requested in proper form by the defendant company, "that it was under no obligation to deliver the message in question to any person except to Mrs. M. C. McCaul, or Joe Knox, and that if the jury should find that neither of these persons were in Trenton upon the day the message was received, the defendant was not required to deliver it to either of them, or to any one else, and that it was not its duty to deliver it to Mrs. Knox, the wife of the party in whose care it was directed, and the failure to do so was not negligence or a breach of duty upon its part." There was no contract to deliver the message to Mrs. McCaul at her residence in the country. The fact that she lived in the country was not disclosed to the receiving operator, and without such knowledge and express or implied agreement otherwise, the contract was to deliver it at Trenton, Mrs. McCaul did not reside there, and was not there that day. It was sent in care of Joe Knox, who did live there, and it must

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be presumed that it was intended that it be delivered to him for the sendee. He was made the special agent of the sendee to receive and forward it. It was under these facts, the duty of the company to deliver it to Joe Knox, and no one else. It was not its duty to deliver it to Mrs. Knox, or other member of the family of Joe Knox. They were not the agents of either the sender or the sendee, and had no authority to receive it. A delivery to them would have been unauthorized. It may be that under some circumstances, as where the wife has been in the habit of receiving telegrams sent her husband, that delivery to her ought to be made, and would be a discharge of the duty of the company. *Telegraph Co. v. Mitchell* (Tex. Sup.), 44 S. W., 274, 40 L. R. A., 209, 66 Am. St. Rep., 920; *Telegraph Co. v. Moseley* (Tex. Civ. App.), 67 S. W., 1059.

But that is where the telegram is addressed to the husband in his own right. He cannot delegate the trust and agency imposed upon him to another. In this case Joe Knox had no beneficial interest in the telegram, and Mrs. Knox no right to receive it. The party in whose care a message is sent is simply the agent of the addressee to receive and deliver the message. He has no beneficial interest in it, or authority to open it. *Telegraph Co. v. Houghton* (Tex. Sup.), 17 S. W., 846, 15 L. R. A., 129, 27 Am. St. Rep., 918.

The delivery of a telegram to the brother and business partner of the party in whose care it is addressed

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is unauthorized. *Western Union Telegraph Co. v. Hendricks* (Tex. Civ. App.), 68 S. W., 720.

The clerk of a hotel is not the agent of the guests of the hotel, and has no authority to receive telegrams for them. *Telegraph Co. v. Cobb* (Tex. Sup.), 67 S. W., 87, 58 L. R. A., 698, 93 Am. St. Rep., 862; *Telegraph Co. v. Redinger* (Tex. Civ. App.), 63 S. W., 156.

The captain of a steamboat is not the authorized agent of passengers to receive and receipt for telegrams. *Davies v. Eastern Steamboat Co.* (Me.), 47 Atl., 896, 53 L. R. A., 239.

There is no complaint because of the final delivery of the message to Mrs. Knox, before the return of her husband, and if there was, no action could be sustained for such an unauthorized delivery, because no damages resulted from it. This assignment of error is also sustained.

3. It is further assigned as error that there is no evidence to sustain the verdict, and for this reason the trial judge should have set it aside, and granted the plaintiff in error a new trial. This assignment is sustained. It is clear, we think, that the company was not guilty of negligence in the delivery of this message. There was no contract to deliver it in the country to Mrs. McCaul, and she was not in Trenton that day, and it could not have been delivered to her there. Prompt inquiry was made for Joe Knox, her agent, and correct information was obtained that he was beyond the delivery limits, and therefore no delivery could be made

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to him. There was no one else authorized to receive the message. The delivery to Mrs. Knox was made before the return of her husband, without any obligation upon the company to do so, at its peril; and it may be safely said that but for the fact that this delivery hastened the reception of the message by Mrs. McCaul by at least one hour and a half, that that would now be the wrong upon which this cause of action would be predicated.

For these errors the judgment of the trial court is reversed.

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KANSAS CITY, MEMPHIS & BIRMINGHAM RAILROAD
COMPANY *et al.* v. A. J. WILLIFORD, *Admr.*

(*Jackson*, April Term, 1905.)

1. **RAILROADS.** The engine is the most perilous part of the train; what protection those riding on engine are entitled to. The railroad engine is at all times the most exposed and perilous portion of the train, and persons not in the performance of any duty there, including by express adjudication passengers and baggage masters, riding on the engine, can claim nothing more than protection from injury by the willful, wanton, or intentional act of the carrier and its employees. (*Post*, p. 114.)

Cases cited and approved: Railroad v. Wilson, 88 Tenn., 318; Railroad v. Bogle, 101 Tenn., 40.

2. **CONTRIBUTORY NEGLIGENCE.** To be determined by the jury, when; and by the court, when.
While contributory negligence, where the facts are fairly debatable, is a question to be determined by the jury under proper instruction, yet, where the facts are incontrovertible, the question then becomes one for the court. (*Post*, pp. 115-118.)

Cases cited and approved: Light & Power Co. v. Hodges, 109 Tenn., 333; Warden v. Railroad (Ala.), 10 South., 276, 14 L. R. A., 553; Martin v. Railroad (C. C.), 41 Fed., 125; Judkins v. Railroad, 80 Me., 417; Hickey v. Railroad, 14 Allen, 429; Railroad v. Langdon, 92 Pa., 21; Railroad v. Thomas, 79 Ky., 160; Railroad v. Greiner, 113 Pa., 600; Railroad v. Ray, 70 Ga., 674; Martensen v. Railroad, 60 Iowa, 705; Railroad v. Jones, 95 U. S. 439; Wilcox v. Railroad (Tex. Civ. App.), 33 S. W., 379.

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3. **SAME.** Proximately causing one's own injury prevents his recovery from another whose negligence also directly contributed to the injury.

Want of ordinary care on his own part proximately contributing to his injury will prevent the injured party from maintaining an action against another who also directly contributed to the injury. (*Post*, pp. 118, 119.)

Case cited and approved: *Butterfield v. Forrester*, 11 East, 60.

4. **SAME.** Remotely causing one's injury will not prevent his recovery from another whose negligence directly caused the injury.

Where the negligence of the plaintiff remotely contributes to his injury, and he is not altogether without fault, still he can maintain an action for his injury against the defendant whose negligence directly contributes to the plaintiff's injury, or is the proximate cause thereof. (*Post*, pp. 119-124.)

Cases cited and approved: *Whirley v. Whiteman*, 1 Head, 610; *Davies v. Mann*, 10 Mees. & Wel., 546; *Inland & Coasting Co. v. Tolson*, 139 U. S., 551; *Railroad v. Ives*, 144 U. S., 408; *Trow v. Railroad*, 24 Vt., 487; *Railroad v. Hellenthal*, 88 Fed., 116, 31 C. C. A., 414; *Gilbert v. Erie Co.*, 97 Fed., 747, 38 C. C. A., 408; *Railroad v. Lee*, 9 South., 233.

5. **SAME.** Trespasser on railroad engine is guilty of such contributory negligence as prevents a recovery for his death from a collision at street crossing; case in judgment.

Where a person, without invitation or necessity, stepped upon and occupied the footboard along and at the rear of a switch engine, presumably with the knowledge of the foreman, and without his objection, and was killed by a collision at a street crossing, which was unavoidable by the utmost energies of the engineer, he was guilty of such gross contributory negligence as precludes a recovery, though the engine was running at a speed greatly in excess of that allowed by a city ordinance.

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6. VERDICTS. For defendant may be directed by trial judge, where there is no evidence to support the action.

It is a proper case for the trial judge to instruct the jury to return a verdict in favor of the defendant, where there is no evidence to support the action. (*Post*, p. 124.)

FROM SHELBY.

Appeal from the Circuit Court of Shelby County.—
J. P. YOUNG, Judge.

C. H. TRIMBLE, for Railroad.

JERE HORN, for Williford.

MR. CHIEF JUSTICE BEARD delivered the opinion of the Court.

This suit was brought by the administrator of one Owen to recover damages in the interest of certain statutory beneficiaries against several railroads, constituting what is called in the record the "Frisco System," for inflicting, as is alleged in the declaration, by actionable negligence, injuries on his intestate which soon after resulted in his death. On the trial of the case there was a verdict and judgment for \$6,500 against the defendants, and they have prosecuted an appeal, in the nature of a writ of error, to this court.

It is disclosed in the record that the deceased lived in

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Mississippi, and during the afternoon of the accident arrived in the city of Memphis in company with one Parker. Soon after their arrival these parties saw, at the corner of Georgia street and Kansas avenue, in the act of pulling out of the yards of the defendant railroads, a switch engine moving backwards, with several freight cars attached. Along the rear end of this engine, which was in front in this movement, there ran what is called a footboard. Without invitation from any one, Owen and Parker stepped upon this footboard, Owen taking a position on the west end thereof, and Parker mounting from it to a seat in the cab. On the same end of the engine, and above the footboard, was the tank, on the sloping part of which sat one Middlebrook, who was the foreman of the train crew. The engineer occupied his seat on the east side of the cab, while the fireman was on the west side, dividing his time between shoveling coal and ringing the bell as the engine proceeded. On the footboard with the deceased were two negroes. With these parties occupying the different positions indicated, the engine backing, with the cars attached, proceeded a short distance south, when it turned east on Broadway to its place of destination.

Broadway, as its name indicates, is a wide avenue, devoted, however, exclusively to railroad use. On it are located six parallel tracks, the fourth from the north being the one on which the engine and cars in question were running. Davie avenue crosses Broadway from

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north to south, at right angles, at a point about one mile east of where Owen and Parker boarded the engine. At the point of intersection there was a flagman.

Approaching this point from the west, the view of objects on Davie avenue, moving north to the crossing, was obstructed by a brick building located at the southwest corner of these two highways, and further, upon the occasion of this accident, by a number of cars which were standing on the track immediately south of the one on which this train was moving.

As the engine approached the crossing, a team of mules hitched to a wagon and driven by a negro came suddenly from the south, out of Davie avenue, upon the track. The uncontradicted evidence is that this driver, as he neared the track, was looking backward, but, turning his head and seeing the engine rapidly coming, he undertook to stop his team and back off. Failing in this, he released the lines and jumped from the wagon, thus saving himself. The mules, however, proceeding across the track, the engine came in violent collision with the wagon. In this collision Owen received the injuries from which his death resulted.

It is undisputed that the flagman was at his post, and as the train advanced he raised his flag to indicate to persons on Davie avenue that it would be dangerous then to attempt to cross; and, further, that, seeing the driver of this team getting dangerously near, the flagman made an ineffectual effort to stop him.

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A number of witnesses were examined with regard to the speed at which this engine was running.

As is always the case where a question of this kind depends upon opinion evidence, the rate of speed was variously estimated to be from six to forty miles an hour. It may be assumed, however, that the jury credited the testimony which fixed the speed at the highest rate. The plaintiff below, also for the purpose of showing negligence on the part of the crew in charge of the train, over the objection of the defendants, offered in evidence an ordinance of the city of Memphis, within whose limits this accident occurred, limiting the speed of all trains and engines passing over any of the highways of the city to six miles an hour. There is no dispute but that the engineer, with perfect appliances for that purpose, did all that could be done to stop the train as soon as the mules appeared, and that it was impossible to control it, at the rate at which it was going, so as to avoid the collision.

The record also shows Owen was on the engine without invitation or necessity, and without the knowledge of the engineer or fireman. It is assumed the foreman, who sat on the tank, did see him, from the fact that this position enabled him to do so, and it may be this is fairly inferable from that fact.

The foreman's knowledge, however, that the intestate occupied this position, and his failure to stop the train and order him from it, cannot lessen the responsibility

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of the intestate. As was said in *Railroad v. Bogle*, 101 Tenn., 40, 46 S. W., 760, the engine is at all times the most exposed and perilous portion of the train; and it was there held, even in the case of a passenger, who in a fancied emergency mounted the engine to prevent being left by the train, that he lost his right to the high degree of care the law accorded passengers riding in a coach, and could claim nothing more than protection from injury by the willful, wanton, or intentional act of the carrier and its employees. In *R. Co. v. Wilson*, 88 Tenn., 318, 12 S. W., 720, a baggage-master left his proper place on the train, and was riding with the engineer and fireman upon the engine when he was killed in a collision with another train, resulting from the negligence of an engineer in charge of an engine running from an opposite direction to that in which his train was moving. It was there held that, having abandoned his post of duty and sought a more exposed and dangerous position on the train, where he was killed, the railroad was not liable.

We do not deem it necessary to consider the various assignments of error upon the action of the lower court, as we are satisfied there is no theory upon which the verdict and judgment in this case should be maintained. The intestate was voluntarily occupying the most exposed position on the most dangerous part of the train at the time of the collision, and this, as has been seen, without invitation, and without any necessity whatever for his being there. That his presence at this place

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proximately contributed to his injury is beyond question. No one on the engine save himself was injured, unless it be one of the negroes riding with him on this footboard. If he had been at any other place on that train, so far as we can see, he would have avoided the danger, and, as a matter of course, if he had not been on the train at all, he would not have been affected by this collision. Under these circumstances, we think, as a matter of law, he was guilty of such gross contributory negligence as to preclude a recovery. While contributory negligence, where the facts are fairly debatable, is a question which under proper instruction should be determined by the jury, yet, where the facts are incontrovertible, the question then becomes one for the court. *Chattanooga Light & Power Co. v. Hodges*, 109 Tenn., 333, 70 S. W., 616, 60 L. R. A., 459, 97 Am. St. Rep., 844.

In *Warden v. Louisville & Nashville R. Co.* (Ala. 1891), 10 South., 276, 14 L. R. A., 553, the plaintiff was a front brakeman, and received the injury which he complained of while sitting on the crossbeam in front of an engine with his legs hanging over in front of the pilot while the train was in motion. The record failed to show that he had any duty to perform, or that any duty could be performed by him while so riding, or that it was in any sense necessary for him at that time to be on the crossbeam.

In that case, after a full citation of authorities, and an able discussion of the rule of law involved, the

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court held the plaintiff's act in being at that place when the accident occurred "was negligence *in se* on his part, to be so declared as a matter of law." To this point the court said: "The investigations of the court and counsel have failed to disclose a single case to the contrary, while many courts are on record as holding, either by analogy or directly, that to ride upon the pilot or crossbeam in front of an engine while proceeding along its line of track, without justifying necessity therefor, involves *per se* such negligence as will defeat an action counting upon injuries received while so riding, and which would not have been received but for the plaintiff's being there. Even the assumption of less dangerous, but at the same time improper, positions on moving trains, voluntarily and unnecessarily has been many times held to be contributory negligence, as a matter of law, neutralizing the negligence of the defendant, and destroying an otherwise good cause of action, as illustrated in the following cases: *Martin v. B. & O. R. Co.* (C. C.), 41 Fed., 125; *Judkins v. Maine Central R. Co.*, 80 Me., 417, 14 Atl., 735, 6 New Eng. Rep., 715; *Hickey v. Boston & L. R. Co.*, 14 Allen, 429; *Penn. R. Co. v. Langdon*, 92 Pa., 21, 37 Am. Rep., 651; *Kentucky Central R. Co. v. Thomas' Adm'r*, 79 Ky., 160, 42 Am. Rep., 208; *Lehigh Valley R. Co. v. Greiner*, 113 Pa., 600, 6 Atl., 246; *Atlanta & C. R. Co. v. Ray*, 70 Ga., 674; *Martensen v. Chicago, R. I. & P. R. Co.*, 60 Iowa, 705, 15 N. W., 569."

In *Baltimore & P. R. Co. v. Jones*, 95 U. S., 439, 24 L.

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Ed., 506, the plaintiff, the employee of a railroad company, left the box car provided for his accommodation, and while returning from his work rode on the pilot or bumper of the engine, and was injured from a collision with some cars standing on the track in a tunnel. On these facts, denying his right to recovery, the court said: "His injury was due to his own recklessness and folly. He was himself the author of his misfortune. This is shown with as near an approach to a demonstration as anything short of mathematics will permit." These cases involved claims arising out of injuries received when the parties so injured had voluntarily assumed positions dangerous in their nature while the trains were in motion. The parties so injured were employes of the roads upon which the injuries occurred but we can see no reason, and certainly none has been suggested, why a mere intruder upon the train, in no sense a passenger, and in no degree entitled to the care that the carrier owes a passenger, should stand on any higher plane, or be permitted to invoke any other principle for the maintenance of his action, than an employee injured or killed under like conditions. That there is no distinction was the evident opinion of the court in *Wilcox v. San Antonio & A. P. R. Co.* (Tex. Civ. App.), 33 S. W., 379, where the right of one who was not an employee to a recovery for an injury received while riding on the footboard of an engine was considered. It was there held that a party riding on the front footboard of a switch engine, even at the invi-

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tation of the engineer in charge thereof, was guilty of such contributory negligence as to prevent his recovery for injuries received as the result of the running of the engine at a reckless rate of speed by the engineer.

But it is contended by the defendant in error that, though it be granted the intestate was without any right on the engine, and was guilty of contributory negligence in choosing the footboard, yet, it appearing the collision and his injuries might have been avoided by the exercise of ordinary and reasonable care on the part of the railroad employees, his representative is entitled to recover. It is said in argument the lack of such care is shown in the unusual rate of speed at which this train was moving (in violation of the city ordinance) in its approach to the much-used, and under existing conditions an extremely dangerous, crossing, and but for this lack the accident might have been avoided notwithstanding the negligence of Owen.

Let it be conceded that the collision might have been avoided if the speed had been within the limit prescribed by the ordinance, and running at the greater rate under these conditions was negligence on the part of the crew in charge of the engine, then we have a case where both parties by their negligence contributed to the injury which would bar this action. For, though theretofore recognized as sound doctrine, yet in the year 1809, for the first time, in *Butterfield v. Forrester*, 11 East, 60, decided by the Court of King's Bench, it was distinctly announced as a rule that the want of ordi-

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nary care on his part, proximately contributing to an injury, would prevent the injured party from maintaining an action against another whose negligence also directly resulted in the injury. This rule has never since been doubted or denied, and that case has been cited with approval in every jurisdiction where the common law prevails. It rests upon the ground, first that it would be a violation of correct principle and sound policy to visit the consequences of the plaintiff's own recklessness upon the defendant where both are directly at fault, and, second, the impracticability in such a case of apportioning the effects of the concurrent negligence so the plaintiff will recover alone for that of the defendant.

However it may have been applied theretofore, at least in *Butterfield v. Forrester*, 11 East, 60, the doctrine was first formulated, and in a distinct form announced that the want of ordinary care on his own part proximately contributing to his injury will prevent the injured party from maintaining an action against another who also directly contributed to the injury. This doctrine announced in 1809 by the Court of King's Bench has never since been doubted or denied, and this case has been cited with approval and followed in every jurisdiction where the common law prevails. The wisdom of the rule has commended itself to both English and American courts which have had occasion to speak with regard to it.

In 1842, in the case of *Davies v. Mann*, 10 Mees. &

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Wel., 546, what has been called a qualification of the rule in *Butterfield v. Forrester* was announced, and it is this qualification which, at the instance of the plaintiff's counsel, the trial judge gave to the jury. The rule in *Davies v. Mann* has been often applied where that case has not been mentioned as authority, and as often where the decision was rested entirely upon its authority. In the supreme court of the United States it is cited with approval in *Inland & Coasting Co. v. Tolson*, 139 U. S., 551, 11 Sup. Ct., 653, 35 L. Ed., 270, *Grand Trunk R. Co. v. Ives*, 144 U. S., 408, 12 Sup. Ct., 679, 36 L. Ed., 485, and other cases as well as in the decision of many of the state supreme courts and of the United States circuit courts in different circuits. It is to be observed, however, that the *Davies Case* did not attack the rule announced in *Butterfield v. Forrester*. To the contrary, it expressly conceded its soundness, but held that it had no application to the case before the court, on the ground that the plaintiff's want of ordinary care did not constitute, because of its remoteness, a bar to the action, while that of the defendant's did proximately operate to bring about the injury. In other words, the defendant's negligence was there held the sole proximate cause of the injury sustained by the plaintiff, in that it arose subsequently to that of the plaintiff, and, the plaintiff's negligence being so obvious that the defendant could by the exercise of ordinary care have discovered it in time to avoid inflicting the injury, his failure to discover and avoid it was

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actionable. This was but the application of the doctrine, well settled, that, where the negligence of the defendant is proximate and that of the plaintiff remote, the action can then well be sustained, although the plaintiff is not altogether without fault. *Trow v. Vermont R. R. Co.*, 24 Vt., 487, 58 Am. Dec., 191. A reading of the opinion in the *Davies Case* makes it entirely clear that the facts raised the question of remote negligence on the part of the plaintiff and proximate negligence on that of the defendant, so plaintiff was given a recovery.

So far as we can discover, no court which has applied the rule there announced has gone further than the authority of the original case. It is true that there is to be found occasional obscurity of statement, so as to raise a doubt as to the limits within which the rule is to be confined, and it may be, and often is, that there is practical difficulty both for courts and juries in determining what is the remote, and what the proximate, cause of an injury; but where once settled that the plaintiff's negligence directly contributed thereto, we assume no well-considered case can be found which holds that the plaintiff can avoid the effect of his negligence and maintain his action against the defendant on the ground that the latter has not exercised reasonable care.

The counsel for the defendants in error in his argument relied with much confidence upon the opinion in *B. & O. R. Co. v. Hellenenthal*, 88 Fed., 116, 31 C. C. A., 414,

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in which there was applied the principle of *Davies v. Mann*. The case at bar, however, was evidently considered by the court as one of remote and proximate causes, and as such proper for its application. That it was not conceived by the court delivering this opinion that this rule would control where the contributory negligence of the plaintiff was a proximate cause of the injury, is apparent from the fact that the same court, speaking through Day, J., now of the supreme court of the United States, in the case of *Gilbert v. Erie Co.*, 97 Fed., 747, 38 C. C. A., 408, after referring to *Coasting Co. v. Tolson*, supra, *B. & O. R. Co. v. Hellenenthal*, supra, and other cases, said, "We do not think the principle settled in these cases applies to the case where it clearly appears that the injury is the result of the concurrent negligence of the plaintiff and defendant."

The doctrine of the *Davies v. Mann* case has been applied in this State in a number of cases, notably in *Whirley v. Whitman*, 1 Head, 610, though without reference to the decision itself. It is a sound and reasonable qualification of the general rule. For no party should be excused from the liability for an injury which he inflicts on another on the ground of the earlier negligence of the latter, when, aware of the latter's exposure to peril, he omits ordinary and reasonable care to avoid the injury. When the observance of this care would have prevented the hurt, failure in that regard is actionable wrong. It is so, not only because such negligence is the proximate occasion of the injury, but

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for the stronger reason that it indicates wantonness, and for this the law affords no excuse. As was said by the supreme court of Alabama in *Ga. Pac. R. Co. v. Lee*, 9 South., 233: "Such failure with such knowledge of the situation, and the probable consequences of the omission to act upon the dictates of prudence and diligence to the end of neutralizing plaintiff's fault and averting disaster, notwithstanding his lack of care, is, strictly speaking, not negligence at all; but it is more than any degree of negligence, inattention, or inadvertence; it is that recklessness or wantonness or worse which implies willingness to inflict the impending injury, or willfulness in pursuing a course of conduct which will naturally or probably result in disaster, or an intent to perpetrate a wrong."

This intent, however, cannot be imputed to one who is without consciousness that his conduct will probably lead to wrong or injury. Nor can it be assumed, from the general fact that in some particular prior to, but in legal sequence one of the circumstances leading up to the injury, the party has been guilty of negligence, when it appears he was unconscious of the perilous position of him who is subsequently injured. Nothing short of actual knowledge of the situation, and an omission of preventive efforts after such knowledge, and where there is a reasonable prospect that such effort will avail, "can suffice to avoid the defense of contributory negligence on the part or imputable to the injured party." *Ga. Pac. R. Co. v. Lee*, supra.

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The case at bar in no sense calls for the application of the rule of *Davies v. Mann*. The facts repel all suggestion of wantonness. Though absolutely unconscious of the extremely exposed position of the deceased, yet, when the emergency appeared involving a menace to the team, wagon, and driver, as well as to the train itself and those on it, the record shows the utmost energies of the engineer, with the best appliances at hand, were unavailingly exerted to avoid the collision.

Upon the facts proven and well-settled legal principle, we are constrained to hold that there was no evidence to support this action. It was a proper case for the trial judge to instruct the jury to return a verdict in favor of the defendants.

It results that the judgment is reversed, and the case is remanded for a new trial.

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J. R. WILSON v. O. ALEXANDER.

(*Jackson*, April Term, 1905.)

1. **SUPREME COURT PRACTICE.** Theory of facts most favorable to the party successful below must be adopted, when.

In disposing of an assignment of error that there is no evidence to sustain the judgment rendered by the circuit judge, the supreme court must adopt that theory of facts most favorable to the party successful below. (*Post*, pp. 128, 136.)

2. **SAME. Same.** Questions of fact and law raised by assignment of error that there is no evidence to sustain the judgment.

An assignment of error that there is no evidence to sustain the judgment rendered by the circuit judge always raises a question of law as well as one of fact, namely, whether the facts, treated as most favorable to the party successful below, justify in law the decision reached, or the judgment rendered by the circuit judge. (*Post*, pp. 128, 129.)

3. **MASTER AND SERVANT.** Operator of machinery of carrier presumed to be servant of carrier, when.

The unexplained fact that one is seen operating the machinery of a carrier is sufficient to justify the conclusion or inference that such person is acting as servant of the carrier, if there is nothing in the manner or circumstances of the occurrence to negative such conclusion. (*Post*, p. 130.)

4. **LANDLORD AND TENANT.** Tenant holding over continues on same conditions as under preceding term.

A tenant holding over after the expiration of his term continues to occupy the relation of tenant towards his former landlord on the same condition as those of the preceding term. (*Post*, p. 131.)

Cases cited and approved: *Shepherd v. Cummings*, 1 Cold., 354; *Noel v. McCrory*, 7 Cold., 623; *Brinkley v. Walcott*, 10 Hels.,

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22; Hammond v. Dean, 8 Bax., 193; Hendrixson v. Cardwell, 9 Bax., 391.

5. **SAME.** Same. Facts justifying finding that the relation was terminated.

Where a tenant continued to operate a ferry after the expiration of his term, and on the occurrence of an accident by which the mules of another were drowned in the act of ferriage, the landlord, though an old man, braved the wintry weather of January, and went to the ferry, a distance of twenty miles, and investigated the matter, thus disclosing such great concern and interest as justified the court in finding that the tenant was then acting as servant of his former landlord, and not as his tenant. (*Post*, pp. 131, 132.)

6. **FERRIES.** Liability of ferryman arises as soon as he directs team to be driven on ferryboat.

A ferryman becomes liable as such for the safety of a team which he undertakes to transport as soon as the operator of the ferry directs the driver of the team to drive upon the ferryboat, (*Post*, pp. 133-135.)

Cases cited and approved: Cohen v. Hume, 1 McColl (S. C.), 439; May v. Hanson, 5 Cal., 360; Blakeley v. LeDuc, 19 Minn., 187; Willoughby v. Horidge, 12 C. B., 742, 74 E. C. L., 742; Richards v. Fuqua, 28 Miss., 792.

7. **SAME.** Negligence in ferryman in not securing boat to bank, and in permitting holes in floor of boat.

A ferryman undertaking to transport a team of mules and the wagon to which they were hitched is guilty of negligence in not having his boat secured to the bank, and in permitting holes in the floor of the boat, through which water could be seen and also in not anticipating that the mules might back off the boat before they were safely upon it. (*Post*, pp. 132, 133, 135, 136.)

Cases cited and approved: Sanders v. Young, 1 Head, 220, 221; Willoughby v. Horidge, 12 C. B., 742, 74 E. C. L., 742; Richards v. Fuqua, 28 Miss., 792; Sturgis v. Kountz, 165 Pa., 358; Lewis v. Smith, 107 Mass., 334.

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8. **SAME.** Driver of team is not guilty of contributory negligence in driving on the boat at invitation of ferryman, when.

It is not contributory negligence on the part of the driver of a team to go upon the ferryboat at the invitation of the ferryman, although he knows that the boat is not fastened to the bank, for he may rely upon the skill and knowledge of the ferryman. (*Post*, pp. 132, 135, 136.)

9. **NEW TRIAL.** Not for newly discovered evidence as to mere date of conversation substantially admitted to be correct, when. Surprise in the evidence of a certain witness as to the date of a conversation, and the discovery of new contradictory evidence, is not ground for a new trial, where the party applying therefor substantially admitted in his evidence that the conversation referred to took place on the date specified, but denied the things were said in that conversation which the witness claimed were said, and the newly discovered witness does not undertake or propose to testify as to the substance of the conversation, nor that he was present thereat. (*Post*, pp. 136, 137.)

FROM HAYWOOD.

Appeal from the Circuit Court of Haywood County.
—J. R. BOND, Judge.

KING & WILLIS, for plaintiff in error.

BATE BOND, for defendant in error.

MR. JUSTICE NEIL delivered the opinion of the Court.

This action was brought to recover damages for the negligent drowning of two mules at a ferry in Haywood

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county, alleged to belong to the defendant below, Wilson, plaintiff in error here. The case was heard before the circuit judge without the intervention of a jury. A judgment was rendered in favor of the defendant in error for \$303, the value of the mules and the harness on them at the time, also sued for.

The theory of the plaintiff below was that the ferry was both owned and operated by Wilson at the time of the injury; that the person then actually in charge of the ferry and operating it, one Ike Williamson, was the servant or employee of the defendant Wilson.

The defendant below advanced two theories. The first one was that he had sold the ferry and the land adjoining it to Ike Williamson by parol, and that when the injury occurred, January 11, 1904, his vendee, Williamson, was operating the ferry on his own account, as owner. His second theory is that, if the first be not made out in the evidence, then that Williamson was his tenant for the year 1903, and was holding over for the year 1904 on the same terms under which he had rented the property for the previous year.

The chief error assigned by defendant below on his appeal to this court is that there is no evidence to sustain the judgment rendered by his honor the circuit judge.

In disposing of this assignment, two principles must be kept in view. The first is that the theory of the facts most favorable to the party successful below must be the one adopted here. The second is that the assign-

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ment we are to consider always raises a question of law as well as one of fact, that is, treating as established the version of the facts most favorable to the party successful below, the question always arises, do these facts establish in law a ground for relief, or a defense, as the case may be; in short, do these facts justify in law the decision which the lower court reached, whether for plaintiff or defendant?

We shall, for convenience, take up at this point the first theory of the defendant below—the theory of a parol sale on December 1, 1903, consummated by a writing on January 23, 1904.

The plaintiff below contends that the two witnesses who testify to the parol sale, Wilson and Ike Williamson, are both discredited; the first by contradiction of his evidence by other witnesses, and the second by direct impeachment through the testimony of witnesses who say that he is unworthy of belief; and, further, that the theory of a parol sale was a thing hatched up between these two after the accident to the mules, with a view to evading on the part of Wilson any claim which the plaintiff below might have against him. We are bound to say that there is some evidence to support both of these contentions, and we must treat the facts as so established. It results that we must conclude that there is nothing in defendant's first contention.

We shall consider together the defendant's second contention and the plaintiff's basic contention, the latter being, as stated, that Wilson, after January 1, 1904,

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was operating the ferry through Ike Williamson as his agent or servant.

There is no direct evidence to support this contention. We have seen that both Wilson and Williamson say that the latter was operating it under his alleged parol purchase, but as stated, this solution cannot be considered, because the circuit judge, on the grounds already stated, had the right to disbelieve the evidence of these witnesses, and we must assume that he did. The plaintiff says that it is shown that Wilson was the owner of the property at the time of the accident, and that Ike Williamson was operating it. There is evidence to support this conclusion, and it must be treated as established. Plaintiff also says that, if a man is seen operating the machinery of a carrier, this fact, unexplained, is sufficient to justify the conclusion that the latter is acting as a servant of the former. We think this is a sound general deduction, if there is nothing in the manner or circumstances of the occurrence to negative the conclusion. Applying this deduction, counsel for plaintiff below argues that, inasmuch as Wilson was the owner of the ferry, and Ike Williamson was operating it, and the evidence of neither of these witnesses is credible, and the fact is unexplained, we must conclude that Ike Williamson was in fact the agent or servant of the said Wilson.

But defendant's counsel says there is an explanation in the evidence. He insists as matter of fact that it is shown that Ike Williamson was the tenant of Wilson

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for the year 1903, and, as matter of law, that the presumption would be, if the said Williamson held over after the expiration of his term, the year 1903, into the next year, 1904, he would occupy the relation of tenant to his former landlord on the same terms as those of the preceding year. The statement of fact as to the tenancy of 1903 is sustained by the witness Rawlings, and there is no evidence to the contrary. The statement of the legal principle, if there was in fact a holding over, is sustained by our own cases of *Brinkley v. Walcott*, 10 Heisk., 22, and *Hammond v. Dean*, 8 Baxt., 193; *Hendrixson v. Cardwell*, 9 Baxt., 391, 40 Am. Rep., 93; *Noel v. McCrory*, 7 Cold., 623; *Shepherd & Mitchell v. Cummings*, 1 Cold., 354; and the principle is a general one.

So, if we assume that Ike Williamson was holding over, the conclusion seems inevitable that he was operating the ferry at the date of the accident as the tenant of defendant, Wilson, and not as his agent or servant.

Plaintiff's counsel, however, refers to a circumstance which he insists furnishes evidence that Ike Williamson was the servant of Wilson, and not holding over as his tenant. This fact is that when the mules were drowned Ike Williamson immediately went to the home of Wilson, and told him of the calamity that had happened, and Wilson thereupon, though an old man, braved the wintry weather of January and proceeded to the ferry, twenty miles away, to investigate the matter, a journey that required of him two days and one

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night going, pursuing his investigations, and returning; and that while near the ferry he hunted up the man who drove the mules, and made inquiry of him.

Counsel for the plaintiff rightly argued that these facts showed great concern on the part of Mr. Wilson. He argued further that this great concern was natural and reasonable if defendant Wilson was operating the ferry himself through Ike Williamson as his agent or servant, and was therefore responsible for the negligence of the latter; but quite unreasonable if the latter was only a tenant, and therefore responsible himself, only, for injuries. This view is certainly a strong one. The inference seems to be sound and just.

His honor the circuit judge had the power to choose between this view of the matter and the one just presented in favor of the defendant. He had the right to hold, and no doubt did hold, that the facts referred to furnished a direct inference of fact that Ike Williamson was holding after January 1st as the servant of Wilson, and not as his tenant; there was never in fact any holding over, hence no extension of the tenancy.

The assignment, therefore, that there was no evidence to support the judgment, must be overruled.

Another assignment raises the point that Hop Wilkes, the servant of plaintiff who drove the wagon, was guilty of negligence which proximately contributed to the injury.

The injury occurred in the following manner: The ferryboat was defective in that it had holes in the floor

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through which the water could be seen. Likewise, it had no means of fastening it to the bank. When the mules were driven on, hitched to the wagon, they began to back, and in doing so pushed the hind wheels against the bank, and the boat out from under them in front, and so fell forward into the river, and were drowned. Plaintiff's servant, Hop Wilkes, knew that the boat was not attached to the bank, but was told by Ike Williamson, the servant of defendant in charge of the ferry, to drive on, which he did, with the result stated.

In *Sanders v. Young* it is said: "A ferryman is liable as a common carrier. . . . Irrespective of the statute of 1842, the keeper of a public ferry is bound to have a boat safe and sufficient for all of the uses and purposes incident to his employment. He is likewise bound at all times to have a skillful ferryman, and a sufficient force to manage the boat, and to take proper care of persons and all kinds of property received for transportation; and for all loss or injury occasioned by neglect of these duties and precautions he is liable." 1 Head, 220, 221, 73 Am. Dec., 175.

"As soon as the ferryman signifies his assent to receive horses and vehicles upon his boat, his liability as a common carrier attaches, and it necessarily continues until the property is landed." 12 Am. & Eng. Ency. Law (2d Ed.), p. 110.

In *Cohen v. Hume*, 1 McCord (S. C.), 439, wherein the above principle was expressed, it was held that the ferryman's liability as a common carrier attached, al-

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though the vehicle was only upon the slip and was being driven by the servant of the owner.

In *May v. Hanson*, 5 Cal., 360, 63 Am. Dec., 135, wherein the injury complained of occurred while the wagon was being driven from the boat, the same rule was stated. In this latter case it is said: "The principle deduced from the authorities is that as soon as the ferryman signifies his assent or readiness to receive the passenger he becomes liable for his safe transit and delivery, and, is liable if any accident occurs, except by act of God or the public enemy."

"In two of the cases just cited the accident occurred in driving into the flat or boat, and in both cases it was held to be the duty of the ferryman to see that the teams were safely driven on board the boat. 'If,' says the court in those cases, 'the ferryman thinks proper, he may drive himself, or may unharness the team or unload them for the purpose of getting them safely on board; but if he permit the party to drive himself, he constitutes him quoad hoc his agent, and is responsible for all accidents.' " *May v. Hanson*, 63 Am. Dec., 137. And in *Blakeley v. Le Duc*, 19 Minn., 187 (Gil., 152), it was held that the ferryman's liability had attached, although only the front wheels of the stage coach had gotten upon the boat when the boat broke away from the bank.

In *Willoughby v. Horidge*, 12 C. B., 742, 74 E. C. L., 742, a ferryman was held liable for injuries to a horse which fell from the slip in leaving the boat, ow-

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ing to the defective condition of the guard rail. In *Richards v. Fuqua's Adm'rs*, 28 Miss., 792, 64 Am. Dec., 121, a ferryman was held liable for loss of a wagon and mule attached thereto, caused by the boat, which was not provided with an apron, breaking from its moorings, owing to their defective condition, when the gunwale was struck by the rear wheels of the wagon.

In *Sturgis v. Kountz*, 165 Pa., 358, 30 Atl., 976, 27 L. R. A., 390, a ferryman was held liable for the loss of a horse which on being frightened by a whistle, backed from the boat through a defective guard chain.

In *Lewis v. Smith*, 107 Mass., 334, in which the plaintiff sought to recover for the loss of a horse, which was under his control while on the boat, and which fell from the boat for want of barriers at the forward end, evidence that the boat had been operated without barriers for thirty years without accident was held inadmissible.

We are of the opinion that in the present case the ferryman became liable for the property as soon as his agent directed the driver of the vehicle to drive upon the boat and that it was negligence on the part of the ferryman in not having the boat secured to the bank; also in permitting holes in the bottom of the boat; also in not anticipating just such an occurrence as happened, viz., that the team might back off of the boat they were safely placed upon it.

We are of opinion that it was not contributory negligence on the part of the driver of the vehicle to go upon

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the boat at the invitation of the ferryman, although he knew the boat was not fastened to the bank. He had the right to rely upon the skill and knowledge of the ferryman. In deed, as has been seen, the property passed into the custody of the ferryman immediately upon his directing the driver to go upon the boat with the team.

It is insisted by the defendant that, even after the horses got into the water they might have been saved but for the negligence of the servant of the plaintiff in not properly assisting in the rescue of the animals. One of the witnesses of the defendant, who undertakes to prove this circumstance, is discredited by testimony of the witnesses who say he is unworthy of belief, and the other by self-contradictions, and we need not consider this matter further. The circuit judge no doubt disregarded their evidence entirely, as he had the right to do, and, following the rule already laid down as to taking the most favorable view in behalf of the party who was successful below, we must do the same.

It is insisted that a new trial should be granted because of surprise in the evidence of one Dickinson as to the fixing of a certain date and the discovery of evidence whereby it could be shown that Dickinson was incorrect. We think this is immaterial. It is substantially admitted by the defendant, Wilson, in his testimony that the conversation referred to did take place on the date fixed by Dickinson, but he denies that the things were said in that conversation which Dickinson

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claims were said. The new witness does not undertake to say anything about the substance of the conversation, and does not say that he was present thereat. His evidence would be of no service, and a new trial should not be granted therefor. *Turnley v. Evans*, 3 Humph., 223.

The foregoing covers the substance of all of the matters contained in the several assignments filed, and, none of them being sustained, the judgment of the court below must be affirmed.

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STATE v. ROSS WITHERSPOON.

(Jackson, April Term, 1905.)

1. **MONOPOLIES, CONSPIRACIES, AND TRUSTS.** Statute (Acts 1903, ch. 140) against, is declared constitutional and valid.

The anti-trust statute (Acts 1903, ch. 140), declaring all agreements, trusts, and combinations, made with a view to lessen, or which tend to lessen, full and free competition in the transportation or sale of articles imported into the State, or in the manufacture or sale of articles of domestic growth, etc., and all agreements tending to control the price or cost to the purchaser or consumer of any product or article to be void, and subjecting parties to such agreements to criminal prosecution, is constitutional and valid. (*Post*, pp. 140-143.)

Acts cited and construed: 1903, ch. 140.

Cases cited and approved: *Balley v. Plumbers' Association*, 103 Tenn., 99; *State v. Brewing Co.*, 104 Tenn., 715; *Connolly v. Pipe Co.*, 184 U. S., 554, 46 L. Ed., 679.

2. **SAME.** Indictment need not charge the means or the evidence of the conspiracy.

An indictment for a violation of the anti-trust statute (Acts 1903, ch. 140) need not charge the means by which the unlawful agreement and conspiracy was intended to be effectuated, or the evidence tending to prove the unlawful agreement, for it is sufficient to charge in the indictment the existence and object of the conspiracy, without any statement of the means intended to be used in its accomplishment. (*Post*, pp. 143, 144.)

Cases cited and approved: *Rex v. Eccles*, 1 Leach, 274; *Rex v. Gill & Henry*, 2 B. & Ald., 204; *People v. Richards*, 1 Mich., 216; *State v. Crowley*, 41 Wis., 271.

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3. **SAME.** Indictment must state terms of agreement, the particular articles, and which are imported or of domestic growth or manufacture, when.

An indictment for the violation of the anti-trust statute (Acts 1903, ch. 140), charging that the defendant, as agent of a certain corporation, did unlawfully, knowingly, and feloniously carry out the terms of the agreement, combination, and conspiracy entered into by such corporation with another corporation, made with a view to lessen, and which tended to, and did lessen full and free competition in the importation and sale of articles imported into this State, and in the manufacture and sale of articles of domestic growth and of domestic raw material and which tended to, and did advance and control the price and cost of product and article to the consumer and buyer, but failing to state the terms of the agreement, or arrangement entered into by the parties, and the particular articles imported or of domestic manufacture or growth, the price of which such agreement, arrangement, and conspiracy tended to control and lessen or advance, is fatally defective.

Acts cited and construed: 1903, ch. 140.

Constitution cited and construed: Art. 1, secs. 9 and 14.

4. **INDICTMENTS.** In words of statute are generally sufficient. An indictment for a statutory offense which substantially follows the statute is generally sufficient. (*Post*, p. 143.)

Cases cited and approved: *Griffin v. State*, 109 Tenn., 17-21; *State v. Morgan*, 109 Tenn., 157-166.

5. **SAME.** Sufficient definiteness of.

All indictments must be sufficiently definite and direct in their averments to give the defendant notice of the particular crime, with which he is charged, and the nature thereof, and must so describe and identify the offense that the judgment in the case can be relied on, in another prosecution for the same thing, as a former acquittal or conviction. (*Post*, pp. 143-147.)

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Cases cited and approved: Pearce v. State, 1 Sneed, 67; Daniel v. State, 3 Hels., 257; Lewis v. State, 3 Hels., 333; Smartt v. State, 112 Tenn., 539.

Constitution cited and construed: Art. 1, secs. 9 and 14.

FROM MADISON.

Appeal from the Criminal Court of Madison County.—LEVI S. WOODS, Judge.

ATTORNEY-GENERAL CATES, R. H. SPRAGGINS and
BULLOCK & TIMBERLAKE, for State.

WM. H. BIGGS, for Witherspoon.

MR. JUSTICE SHIELDS delivered the opinion of the Court.

This case involves the sufficiency of an indictment against the defendant preferred under chapter 140, p. 268, of the Acts of 1903, commonly known as the "Anti-Trust Statute" of that year.

The indictment, other than the formal caption, is in these words:

"The grand jurors for the State upon their oath present that Ross Witherspoon heretofore, to wit, on the ——— day of April, 1903, and at divers other times since said date, and before the finding of the indictment

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in this case, did in Madison county, Tennessee, unlawfully, knowingly, and feloniously as president, director and agent of the Southern Seating & Cabinet Company, a corporation chartered under the laws of the State of Tennessee, with its situs and principal place of business in Jackson, Tennessee, carry out the stipulations, purposes, prices, rates, and orders, made by the said Southern Seating & Cabinet Company with the American School Furniture Company, a foreign corporation, in furtherance of a conspiracy against trade, to wit, the said Southern Seating & Cabinet Company and the said American School Furniture Co. having theretofore entered into, and being then and there parties to an arrangement, contract, agreement, trust, and combination with a view to lessen, and which tended to, and did lessen full and free competition in the importation and sale of articles imported into the State of Tennessee, and in the manufacture and sale of articles of domestic growth and of domestic raw material, and which tended to and did advance and control the price and cost of such product and article to the consumer and buyer thereof against the peace and dignity of the State."

It was quashed upon motion of the defendant, the grounds of the motion being:

- (1) The said indictment does not charge or allege any crime or offense against the laws of Tennessee.
- (2) It does not contain a sufficient statement of the

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facts constituting the offense or crime with the commission of which the defendant is charged.

(3) It does not state and describe any particular violation of the statute upon which it is predicated, but is general and indefinite in its terms. The State appeals, and assigns error.

The statute upon which this indictment is predicated (Acts 1903, p. 268, c. 140) has not been before this court for construction; but a similar statute, enacted in 1897 (Acts 1897, p. 241, c. 94), has been held constitutional and sustained. *Bailey v. Master Plumbers*, 103 Tenn., 99, 52 S. W., 853, 46 L. R. A., 561; *State v. Schlitz Brewing Co.*, 104 Tenn., 715, 59 S. W., 1033.

This act—the one construed in the cases cited—contained a section exempting from its provisions contracts in relation to agricultural products and live stock while in the hands of the producer or raiser. A similar statute containing a like provision, enacted by the general assembly of Illinois was held by the supreme court of the United States, in the case of *Connolly v. Union Sewer Pipe Company*, 184 U. S., 554, 22 Sup. Ct., 431, 46 L. Ed., 679, to be for this reason a denial of the equal protection of the law, and repugnant to the fourteenth amendment of the constitution of the United States. The present act does not contain this objectionable provision. It is the same in all particulars as the former act, with that exception, and both upon the authority of the cases of *Bailey v. Master Plumbers' Association* and *State v. Schlitz Brewing Company*, *supra*, and as

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a question of first impression, we are of the opinion, and hold, that it is a valid and constitutional statute.

The only question, then for consideration in this case is whether or not the indictment preferred against the defendant sufficiently charges a violation of the statute. The indictment follows, and is in the language of the act, and it is said, and generally it is true, that an indictment for a statutory offense which substantially follows the statute is sufficient. *State v. Morgan*, 109 Tenn., 157-166, 69 S. W., 970; *Griffin v. State*, 109 Tenn., 17-21, 70 S. W., 61; 1 Whart. Crim. Law, section 364.

It is also correctly said that in a prosecution for a conspiracy, which a violation of this statute is by it declared to be, the means by which the unlawful agreement and conspiracy was intended to be effectuated, or the evidence tending to prove the unlawful agreement, need not be set out, and that it is sufficient to charge in the indictment the existence and object of the conspiracy, without any statement of the means intended to be used in its accomplishment; the means being only matters of evidence to prove the fact of conspiracy. 3 Whart. Crim. Law, section 1345; 1 Eddy on Combinations, p. 226, section 350; *Rex v. Eccles*, 1 Leach, 274; *Rex v. Gill & Henry*, 2 B. & Ald., 204; *People v. Richards*, 1 Mich., 216, 51 Am. Dec., 75; *State v. Crowley*, 41 Wis., 271, 22 Am. Rep., 719.

But this does not meet the objection to this indictment. It is not that the indictment fails to set out the

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means by which the conspiracy charged was intended to be carried into effect, but that the conspiracy and the object to be effected are not sufficiently stated and charged so as to give the defendant notice of the particular crime and its nature with which he is charged, and to so describe and identify the offense that the judgment in this case could be relied upon in another for the same thing, as a former acquittal or conviction. All indictments must be sufficiently definite and direct in their averments to do these things. It is provided by our constitution: "That no person shall be put to answer any criminal charge but by presentment, indictment or impeachment," and "that in all criminal prosecutions the accused hath the right to be heard by himself and his counsel and to demand the nature and cause of the accusation against him and to have a copy thereof." Const. art. 1, sections 9, 14.

This court said in the case of *Pearce v. State*, 1 Sneed, 67, 60 Am. Dec., 135, where the presentment was in the language of the statute, and charged the defendant with "unlawfully and knowingly voting in the county of Rhea, not being a qualified voter of said county": "We think the presentment bad. The nature and cause of the accusation are not well stated. The presentment is in the words of the statute, and the words are 'a qualified voter.' And for the facts which constitute a qualified voter we are to refer to the constitution and laws, from which it will be seen that there are several grounds of disqualification. Now, for which of these

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causes was the defendant disqualified? The presentment does not inform him, and the cause can only appear in the proof, when he may be taken by surprise and be wholly unprepared to make his defense, however just and valid it may be."

And in *Daniel v. State*, 3 Heisk., 257, in sustaining a motion to quash a presentment against the plaintiff in error charging him with unlawfully and feloniously assuming to act as a justice of the peace of Meigs county, in trying a certain party upon a day named for a misdemeanor, "he not being at said time a legally qualified justice of the peace," this court, after quoting article 1, section 9, of the constitution above stated, said: "The object of this provision is unmistakable and clear, that a party accused should know from the statements and allegations of the indictment or presentment against him, not only the charge or accusation, but its nature and cause. It is intended to give him notice of the facts sought to be proved against him in order to his conviction, and for this purpose he is entitled to have a copy of the accusation." And, after citing the case of *Pearce v. State*, *supra*, proceeds: There are at least four cases of disqualification from holding office in our State, so that the above case is conclusive of this one; unless we should overrule it; which we do not feel that we ought to do. We have examined this record containing the presentment, trial, and conviction, with the proceedings had therein, but as there is no bill of exceptions containing the proof in it, we are totally at a

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loss to surmise what was the 'nature and cause of the accusation' of which the party stands convicted. We, therefore, cannot hold that the presentment gave the defendant notice of the offense with which he stood charged with sufficient certainty to enable him to make his defense to it understandingly."

In *Lewis v. State*, 3 Heisk., 333, where the indictment charged the defendant with having stolen, "one five and one dollar greenback bill United States currency, national bank bills, and money," in sustaining a motion for arrest of judgment it is said: "Can it be determined from this statement, with reasonable certainty, what it is that is charged to have been stolen? Certainly greenback bills, United States currency, national bank bills, and money, cannot all mean the same thing; and to charge in the same count that a bill is a greenback bill, United States currency, national bank bill, is certainly indefinite and uncertain in its description of the articles said to have been stolen."

In the late case of *Smartt & Carson v. State*, 112 Tenn., 539, 80 S. W., 586, the indictment charged the plaintiffs in error with the crime of committing an abortion, and with administering a drug and using instruments for the purpose of affecting an abortion in the language of the statute, but the manner in which the instrument was used was not stated, and for this reason a motion was made in trial to quash the indictment because of an insufficient statement of facts constituting the offense, but was overruled. This court,

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in reversing the judgment of the trial court for failure to sustain the motion, said: "The principle underlying the rule is that there must be sufficient facts alleged to reasonably identify the special transaction upon which the defendant is being prosecuted, not only that he may know whereof he is accused, and may prepare his defense, but also in case of a subsequent prosecution, it may be made to appear whether he was prosecuted twice concerning the same matter. The mark of identification is slight, but it is substantial; and in a class of cases where the allegations of the indictment are necessarily very general, such means of marking the transaction, which the case easily lends itself to, should not be ignored, but should be insisted upon."

This indictment does charge that the defendant "as president, director, and agent of the Southern Seating & Cabinet Company, in Madison county, Tennessee," did unlawfully, knowingly, and feloniously carry out the terms of the agreement, combination, and conspiracy entered into by the Southern Seating & Cabinet Company with the American School Furniture Company, made with a view to lessen, and which tended to, and did lessen, full and free competition in the importation and sale of articles imported into this State and the manufacture and sale of articles of domestic growth and of domestic raw material, and which tended to, and did advance and control the price and cost of such product and article to the consumer and buyer. But it utterly fails to state the terms of the agreement,

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or arrangement entered into by the parties, and the particular articles imported or of domestic manufacture or growth, the price of which such arrangement, agreement and conspiracy tended to control and lessen or advance. The indictment would apply to imported articles as well as domestic articles, and to domestic manufactured articles equally with articles of raw material. It would apply equally to any one of the hundreds of articles of commerce which are imported into the State, or which are here manufactured or otherwise produced. It clearly, for these reasons, fails to give the defendant any notice of the nature of the charge brought against him, or of the particular crime with which he is accused, and is held to answer, so that he could with intelligence prepare his defense. Nor is the crime charged so identified that the record in this case could be relied upon in another for the same offense upon the plea of former conviction or acquittal. The indictment should charge the particular article, whether imported or of domestic manufacture and growth, in relation to which the contract, arrangement, and agreement between the parties is made, and the effect of such arrangement upon the prices of such articles. Without a statement of these facts the defendant will be put to trial without presentment or indictment, and will be denied his constitutional right to know the nature and cause of the accusation against him.

The judgment of the trial court sustaining the motion to quash this indictment must therefore be affirmed.

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The defendant may be required to enter into a recognizance to appear at the next term of the circuit court of Madison county to answer such further proceedings as may be had in that court, in relation to the offense attempted to be charged against him in the indictment quashed.

Hamilton v. Gaslight Co.

G. G. HAMILTON *et al.* v. BROWNSVILLE GASLIGHT COMPANY *et al.**

(Jackson, April Term, 1905.)

1. **TAX SALES.** Assessment and list of sales must show items and amounts in dollars and cents; mere figures without more are insufficient, and render sale void.

The absence of the dollar mark or any thing to indicate what is meant by the figures in the assessment of property for taxation or in the trustee's certified list of sales of lands for taxes furnished to the clerk of the circuit court renders such tax sales of land void. Such list should show in dollars and cents the amount of taxes, as well as each item of costs and penalties. Mere figures entered between perpendicular lines without more are insufficient.

Acts cited and construed: 1899, ch. 435, sec. 55.

Cases cited and approved: Randolph v. Metcalf, 6 Cold., 400, 407; Dunn v. Dunn, 99 Tenn., 612; Barnes v. Brown, 1 Tenn. Chy. App., 740; Anderson v. Post, (Tenn. Chy. App.), 38 S. W., 283.

2. **SALE.** Purchaser under void sale is entitled to be reimbursed for taxes and interest, but not for costs and penalties; and must pay costs of suit.

Where the sale of land for taxes is void, the purchaser is entitled to have refunded to him the taxes for which the land was sold, and all subsequent taxes paid by him, with interest on all, but no penalties or costs; and the owner seeking to have such sale declared void and removed as a cloud must pay such purchaser such sum. Costs of suit adjudged against such purchaser. (*Post*, pp. 154, 155.)

*As to how far purchaser at judicial sale is protected as *bona fide* purchaser, see note to Riley v. Martinelli (Cal.), 21 L. R. A., 33.

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FROM HAYWOOD.

Appeal from the Chancery Court of Haywood County.
—JOHN S. COOPER, Chancellor.

J. W. E. MOORE and ROBT. E. KING, for complainants.
KINNEY & WILLS and BATE BOND, for defendants.

MR. JUSTICE WILKES delivered the opinion of the Court.

This is a bill to foreclose a deed of trust made by the light company, and to remove a cloud upon the title to a part of the property embraced in the deed of trust, caused by a tax deed made by the clerk of the circuit court of Haywood county to the defendant Brownsville Cotton Oil Company.

The chancellor gave judgment for the amount of the debt, \$4,247, and a decree to foreclose the deed of trust, but dismissed the bill as to the property held by the oil company under the tax deed. Complainants prayed an appeal from so much of the decree as refused them the relief as against the tax deed of the oil company.

The oil company prayed an appeal from certain provisions of the decree, but does not appear to have given

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bond, and perfected the same; and it need not, therefore, be further noticed, as complainants prayed only a special or partial appeal.

Quite a number of errors are assigned, but we need only notice the last one, as, in our opinion, it is conclusive of the case.

This assignment is, in substance, that the lists of sales filed by the trustee with the circuit court clerk fail to show the amount of taxes, interest, costs, and penalties, in dollars and cents. They are, therefore, irregular, and divest no title out of the taxpayer, and vest none in the purchaser, and all proceedings based upon such lists are void and of no effect.

Examining the lists as they appear in the record, so far as they relate to this particular property, it appears that it was sold to the State of Tennessee. It further appears that there are certain figures entered on the lists between perpendicular lines, but there is nothing to show or indicate what is meant by these figures. There is no dollar mark attached to any of them, nor does the dollar mark appear anywhere upon the lists, except in the valuation of the property.

It has been held in a number of cases that the absence of the dollar mark to indicate what is meant by the figures in the assessment of property is fatal to the assessment, and that perpendicular lines between the figures, separating them, will not suffice to make the assessment good.

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The question is fully treated in *Barnes v. Brown*, 1 Tenn. Ch. App., 740.

The holding in that case is followed in the case of *Anderson v. Post* (Tenn. Ch. App.), 38 S. W., 283, which case is approved by the case of *Dunn v. Dunn*, 99 Tenn., 612, 42 S. W., 259, and the same doctrine is also held by this court in the case of *Randolph v. Metcalf*, 6 Cold., 400-407, and in a large number of unreported cases.

We are of the opinion that defects of the character mentioned, which will render an assessment invalid and void because it does not state specifically, plainly, and definitely the amount of taxes, will likewise render the lists of sales insufficient and void.

Looking at the lists as we find them in the record, the figures appear to be added into a total of 1527. There is a red line between the 5 and 2, but no dollar mark appears anywhere, either in the separate items or in the total amount; and we are left to conjecture whether the amount is \$1,527 or \$15.27, or some other amount, or whether, indeed, it represents any amount in dollars and cents.

We cannot assume that the perpendicular red lines are symbols or substitutes for dollar marks.

Section 55 of the act of 1899 (Acts 1899, p. 1136, c. 435) provides what the certified lists shall contain, in substance, among other things, the day of sale, the amount of the respective taxes for which said sale was made, and each item of costs thereof, which lists shall

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be made in book form and kept by the clerk as a part of the records of his office, and said lists shall be in lieu of conveyances, and vest titles in the treasurer to all the lands embraced in the lists, just as a conveyance to the treasurer would do.

We think it important that this list of sales by the trustee, furnished to the clerk of the circuit court, should be equally as specific and definite in showing the amount of taxes in dollars and cents, as well as each item of costs and penalties in dollars and cents, as would be required to make a valid assessment, and the lists failing to show specifically and definitely the amount of each item of taxes, costs, and penalties, the lists will be insufficient and invalid to divest title out of the owner of the property, and to vest it in the State, or in the purchaser from the State.

Without passing upon the other assignments, we are of opinion that the sale to the oil company by the clerk of the circuit court was without authority, invalid and void, and conferred no title upon the oil company as purchaser, and that complainant is entitled to have the cloud, caused by said void sale, removed from the title of the land involved, upon the condition that it pay the amount of taxes assessable against the land for the year 1899, and all subsequent taxes and proper interest on all the same, but without any penalties or costs.

The oil company will take nothing by its purchase, but is entitled to have refunded to it such amount as it has paid out for taxes upon the land and interest up-

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on the same; but, inasmuch as the sale is void, it is not entitled to have any costs or penalties, which it may have paid, refunded to it.

The oil company will pay the costs of the court below, so far as such costs have accrued in the litigation of the tax title; and the cause will be remanded to the court below for such further proceedings as may be proper.

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STATE, *ex rel.* R. A. HURT, v. A. M. ALEXANDER *et al.*

(*Jackson*. April Term, 1905.)

1. **JUDGMENTS.** Against State and county for costs in tax suits are not invalidated by what.

Judgment in a tax suit for costs against the State and county is not invalid because of its failure to recite that it was pronounced in favor of the clerk and master, or because of its omission to specify in detail the items of costs and their apportionment between the State and county, or because it awarded an execution against the county. (*Post*, pp. 163, 164.)

Case cited and approved: *Gillet v. Roadman*, 5 Hum., 44.

2. **COSTS.** Adjudged against county in tax suits are not required to be certified by district attorney and presiding judge.

Statutes requiring the certification of costs against a county by the district attorney and presiding judge as prerequisite to their payment apply to the certification of costs in criminal cases, and not to costs adjudged against a county in a tax suit. (*Post*, pp. 164, 165.)

Code cited and construed: Sec. 672 (S.).

Acts cited and construed: 1897, ch. 29, sec. 1.

Cases cited and approved: *State v. Wilbur*, 101 Tenn., 211; *Henderson v. Walker*, 101 Tenn., 229; *Donaldson v. Walker*, 101 Tenn., 242.

3. **SAME.** County's previous appropriation for and payment of costs in tax suits is not available against subsequently adjudged and taxed costs, when.

Where certain costs were adjudged and taxed against a county more than a year after an appropriation had been made by the county court to the relator for costs in tax suits, such appropriation and payment is no defense by the county against a mandamus suit to compel the issuance of a warrant and payment for such adjudged and taxed costs. (*Post*, pp. 165, 166.)

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4. **SAME.** Same. Plea of set-off that is too vague and uncertain to present an issue of fact.

In a mandamus suit to compel the payment of costs adjudged and taxed against a county in a tax suit, an averment that prior to said judgment a certain amount was appropriated by the county court and paid to the relator for similar claims for costs in tax suits involving double assessments, for which the county was not liable, alleged as a claim of equitable set-off, is too vague and uncertain to present an issue of fact, because there is no specification showing wherein said costs were illegal, or on what tracts of land, or in what amount they were paid. (*Post*, pp. 165-167.)

5. **MANDAMUS.** Presumption in favor of petition, where the return fails to answer the important facts.

Whenever it appears in a mandamus suit that the return fails to answer the important facts alleged in the petition, every intendment and presumption will be made against it. (*Post*, p. 167.)

6. **SAME.** Allegations neither denied nor confessed and avoided are taken as true.

In a mandamus suit, allegations in the petition, which are neither denied nor confessed and avoided in the return, will be taken as true. (*Post*, p. 167.)

7. **SAME.** Motion for peremptory writ is equivalent to a demurrer to the return.

In a mandamus suit, a motion for a peremptory writ on the pleadings is equivalent to a demurrer to the return for not stating facts sufficient to constitute a defense. (*Post*, p. 167.)

Cases cited and approved: State, ex rel., v. Marks, 6 Lea, 12; Harris v. State, 96 Tenn., 496.

8. **COSTS.** Fee for taxing costs in tax suits when suit is dismissed as to one defendant for double assessment.

Statute requiring not less than twenty-five defendants in tax suits, and providing for the apportionment of costs among all

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or arrangement entered into by the parties, and the particular articles imported or of domestic manufacture or growth, the price of which such arrangement, agreement and conspiracy tended to control and lessen or advance. The indictment would apply to imported articles as well as domestic articles, and to domestic manufactured articles equally with articles of raw material. It would apply equally to any one of the hundreds of articles of commerce which are imported into the State, or which are here manufactured or otherwise produced. It clearly, for these reasons, fails to give the defendant any notice of the nature of the charge brought against him, or of the particular crime with which he is accused, and is held to answer, so that he could with intelligence prepare his defense. Nor is the crime charged so identified that the record in this case could be relied upon in another for the same offense upon the plea of former conviction or acquittal. The indictment should charge the particular article, whether imported or of domestic manufacture and growth, in relation to which the contract, arrangement, and agreement between the parties is made, and the effect of such arrangement upon the prices of such articles. Without a statement of these facts the defendant will be put to trial without presentment or indictment, and will be denied his constitutional right to know the nature and cause of the accusation against him.

The judgment of the trial court sustaining the motion to quash this indictment must therefore be affirmed.

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The defendant may be required to enter into a recognizance to appear at the next term of the circuit court of Madison county to answer such further proceedings as may be had in that court, in relation to the offense attempted to be charged against him in the indictment quashed.

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amounting to \$1.51, accrued in a certain proceeding filed on behalf of the State and county of Madison in the year 1892 against E. W. Campbell, Vincent Exum, et al., for the collection of certain delinquent taxes which were assessed for the year 1890. There were twenty-five defendants to the bill, and as many separate tracts of land against which tax liens were sought to be enforced. On the 15th of August, 1901, the suit as to Vincent Exum was dismissed, because it appeared there had been a double assessment of his property. Accordingly the following decree was entered, namely:

"In this case it appears that there is a double assessment of the property described in the bill in the name of Vincent Exum, the same having been assessed to and paid in the name of W. A. Taylor. It is so ordered and decreed, and the cause as to the said Vincent Exum is dismissed at the complainant's cost. The portion to be paid by the State will be certified to the proper officer for inspection and allowance, and for the portion to be paid by the county execution may issue."

The county's portion of this bill of costs amounts to \$1.51, for the collection of which these proceedings were commenced.

The relief asked is: (1) An alternative writ of mandamus against A. M. Alexander, chairman of the county court, to compel him to issue his warrant upon the county trustee for the payment of said bill of costs; or (2) for an alternative writ of mandamus commanding the justices of said county of Madison to forth-

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with levy and cause to be collected a special tax for that purpose.

Alternative writs of mandamus were accordingly issued upon the fiat of Chancellor Hawkins.

The Chairman and justices of the county court of Madison county made answer and return to said alternative writs of mandamus, in which it was denied (1) that R. A. Hurt had obtained a decree in his favor in the chancery court against the State or the county of Madison, and defendants denied that either the State of Tennessee or the county of Madison was indebted to R. A. Hurt, clerk and master, in any amount. (2) It is averred that there is no statute in the State of Tennessee operating defendants with the payment of such costs, but the law provides that such costs are collectible only out of the proceeds of the sale of the land for such delinquent taxes. It was further insisted that under the Acts of 1895 the county assessor or his deputy was required to pay all costs that might accrue on account of double assessments, and hence it is claimed that the relator should have pursued his remedy against the tax assessor. (3) It is further averred there was no statute of this State that authorized the chancery court of Madison county to render a decree for costs in the said cause against the State of Tennessee and the county of Madison, and that such decree is null and void. (4) It is averred that the relator, R. A. Hurt, in 1900 appeared before the quarterly court and asked an appro-

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priation for the payment of costs due him in back tax cases on account of double assessments, etc., including the present case, and that an appropriation amounting to \$1,944.81 was accordingly made for his benefit and was by warrant paid to him.

It is further averred that prior to this time the county had made a similar appropriation to said Hurt for costs in back tax cases on account of double assessments. It is insisted that the county was not liable in any of those cases, and that it is not now indebted to the said Hurt in any amount.

Defendants called for a jury to try the issues of fact tendered. Defendants, after filing their answers, moved to dismiss the petition and alternative writ of mandamus, which motion was by the court overruled. Thereupon the relator moved for the issuance of a peremptory writ of mandamus on the petition and answer of the defendants, which motion was by the court sustained. The defendants excepted to the ruling of the court and have prosecuted the present appeal.

The first assignment of error is that the decree upon which the relator relies for the collection of his costs is void for uncertainty, in that (1) "it does not say when it was rendered," (2) "or for what amount of costs it was rendered," (3) "it does not say what part of the costs the State would pay, what part of the costs the county would pay," (4) "it nowhere states in what the costs of that case consisted, nor to whom it should be paid," and for these reasons the decree should be ad-

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judged void, the petition dismissed, and the alternative writ of mandamus quashed.

It is conceded by counsel for the relator that said decree is inoperative, so far as it awards an execution against the county, for the reason the statute provides another remedy for the payment of decrees against the county and the property of the county cannot be levied upon by execution for the collection of a debt. But we agree with counsel in his contention that the awarding of an execution does not invalidate the decree, if it is otherwise correct; nor do we think the other objections urged against the decree, based on its failure to recite that it was pronounced in favor of the clerk and master and its omission to specify in detail the items of cost and their apportionment between the State and county, vitiate the decree. The court is not required to embody in its decree the particular items of cost awarded to clerks, officers, and witnesses, and no such practice has ever prevailed in this State. But the uniform rule is to pronounce a general judgment in favor of one or the other of the litigants and to leave their taxation to the clerk. This practice is recognized in *Gillet v. Roadman*, 5 Humph., 44, wherein it is said as follows, viz.:

"It is true, the amount of the costs was not ascertained before the judgment was rendered, and by the court stated and set out in the judgment; nor has this ever been the practice in this State. A judgment is rendered for costs generally, which is a recovery of all costs that have by law accrued. True, the taxation of costs

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is under the supervision of the court, and there is not by judgment a recovery of any item of costs that has not been legally taxed. But, when the costs are legally taxed and the amounts ascertained, the judgment for costs is a judgment for that amount."

It may be observed, moreover, that an ample remedy is provided by our statutes for the retaxation of costs when the clerk has committed error or exceeded his authority.

The second assignment of error is that these costs are not collectible, for the reason they are not certified by the chancellor and attorney-general in accordance with the provisions of the statute, viz.:

"No warrant shall be drawn for costs against a county unless the same has been regularly taxed by the clerk, examined by the district attorney and presiding judge of the court in which the costs accrued and by them certified under the seal of the court to be correctly taxed and lawfully chargeable upon the county." Shannon's Code, sec. 672.

"In making said certificate the judge and attorney-general shall certify the aggregate amount of each bill of costs, writing said aggregate amount in both words and figures, and no bill of costs shall be paid unless so certified." Acts 1897, p. 155, c. 29, sec. 1.

We think these statutes are wholly inapplicable in the present instance, since they refer to the certification of costs in criminal cases accruing in courts not only provided with a judge but an attorney-general. We do

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not recall any case in which this question was expressly decided, but the uniform practice and application of the statute has related to criminal cases. Such practical construction is obviously correct. *Donaldson v. Walker*, 101 Tenn., 242, 47 S. W., 417; *Henderson v. Walker*, 101 Tenn., 229, 47 S. W., 430; *State v. Wilbur*, 101 Tenn., 211, 47 S. W., 411.

The third and fourth assignment of error raise cognate questions and may be considered together. The substance of these assignments is that the chancellor erred in awarding a peremptory writ of mandamus on the pleadings without hearing proof on the material issues of fact tendered by the answer.

(1) It is averred generally in the answer that the defendants are not indebted to the relator, Hurt, in any amount.

(2) It is averred that R. A. Hurt, or R. A. Hurt, clerk and master, as respondents believe and expect to prove, has received his full legal costs in the case of *State of Tennessee et al. v. E. W. Campbell et al.*, and that there is nothing due in that cause or on account of that cause.

(3) It is averred that the relator, Hurt, in 1900, appeared before the county court and asked that court to make an appropriation to him on account of back taxes in cases of double assessment, including the present case, and the county court did appropriate to him a warrant for \$1,944.81.

(4) It is averred that before the time last mentioned

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a large amount was appropriated by the county court on similar claims for the payment of costs in back tax cases on account of double assessments, and the amount so paid the relator, Hurt, was a full satisfaction of his costs in the present case.

It will be observed that the first and second paragraphs herein contain a general denial of any indebtedness on the part of the defendants to the relator on account of the costs in question, while the third and fourth paragraphs contain specific statements showing how those costs had been satisfied. It will be observed that the appropriation of \$1,944.81 alleged to have been made by the county court for the benefit of the relator, Hurt, was made in 1900, while the costs now sought to be collected accrued in the case of *State et al. v. Campbell*, which was not determined until August 15, 1901. It appears, moreover, that there were twenty-five defendants to the Campbell bill, and as many separate and distinct tracts of land were involved. It may be true that the costs as to some of these defendants accrued prior to the alleged appropriation by the county court, and may have been embraced within that appropriation; but the specific costs now sought to be collected accrued over a year after said appropriation was made and on account of a double assessment of the property of the defendant Exum.

As respects the averment that prior to 1900 a large amount had been appropriated by the county court for the benefit of the relator in payment of similar claims

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for costs on account of double assessment for which the county was not liable, it is suggested that such illegal payment of costs may be now interposed against the collection of the present case, as an equitable set-off; but it will be perceived there is no specification showing wherein said costs were illegal, or on what tracts of land they were collected, or in what amount they were paid, so that, if such a matter could be set off in a proceeding of this character, the averments of the answer respecting the alleged set-off are too vague and uncertain to present an issue of fact for the settlement of the court.

These averments of the answer were intended as a plea of payment, but the specifications showing the payment are wholly insufficient to support the plea.

The following propositions of law are settled:

(1) Whenever it appears that "the return fails to answer the important facts alleged in the petition, every intendment and presumption will be made against it."

(2) That "allegations not denied, nor confessed and avoided, are taken to be true."

(3) That, "if the relator moves for a peremptory writ upon the pleadings, this motion is equivalent to a demurrer to the return for not stating facts sufficient to constitute a defense." *State, ex rel., v. Marks*, 6 Lea, 12; *Harris v. State*, 96 Tenn., 496, 34 S. W., 1017.

The fifth assignment of error is that in no event is the relator entitled to collect fifty cents for taxing costs, since that fee is incident to the taxation of the whole

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costs as to all of the defendants, and that therefore, the clerk would not be entitled to collect fifty cents on the dismissal of the bill as to only one defendant.

This assignment of error is not well taken. The object of the statute in requiring not less than twenty-five defendants was to prevent an unnecessary accumulation of costs and to provide for their apportionment among all the defendants; but this disposition of costs would only apply in cases where final decree might be rendered for the sale of the land, and not, as in this case, to double assessments.

The sixth assignment of error is the chancellor should have decreed that the remedy of the relator for costs that accrued in this case of double assessment was against the assessor. This assignment is based on section 18, c. 26, p. 86, Acts 1891, Ex. Sess., as follows:

"When the bill is dismissed on account of double assessment the assessor shall be liable for and shall pay all the costs in the case, as though he owned the property, and to this end he may be made a party to the suit by giving him five days notice and by serving same as other notices are served."

It is insisted this is the exclusive remedy provided by law for the collection of costs that have accrued in double assessment cases, and that the relator should have pursued his remedy against the tax assessor in accordance with the provisions of the statutes just cited.

It is further averred that this statute is applicable in the present instance; for, although the bill was not

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filed until 1892, its purpose was the collection of State and county taxes assessed for the year 1890.

But it must be further remembered that the assessments involved herein were made for the year 1890, while the act declaring the assessor liable for all costs where the bill is dismissed on account of a double assessment was not passed until the year 1891, more than a year after the assessment had already been made. It cannot be supposed that the legislature intended to penalize an act performed by the assessor more than a year before, when at the time there was no punishment or liability affixed to that act. So that it is clear the act of 1891 adjudging the assessor liable for all costs in cases of double assessments has no application to assessments made for the year 1890. But it must be confined to assessments thereafter made. Moreover, we do not concur with counsel in their position that the remedy provided by the act of 1891 against the assessor is an exclusive remedy, and that the assessor can alone be looked to for the payment of all costs growing out of a double assessment. It might transpire that the assessor and his bondsmen were wholly insolvent, and in such cases under the construction of the act now contended for, those entitled to costs would be remediless.

Moreover, the relator herein was not the back tax attorney at the time the bill against Campbell et al. was filed, and it was no part of his duty to make the tax assessor a party to that proceeding and proceed against that officer for the former's cost.

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The object of that act was to provide an indemnity to the State and county for costs that might be incurred on account of the negligence and carelessness of the assessor in making erroneous and double assessments. But it was not intended in the first instance to provide an exclusive remedy for the clerk and other officers for the collection of their costs in such cases.

The seventh assignment is that the allowance of said bill of costs by the chancellor was in direct contravention of section 78, c. 174, p. 371, of the Acts of 1901, which provides as follows, viz.:

"Provided, that no fees shall be allowed to former attorneys or agents who have failed to prosecute suits to a final determination under former acts, and in no event shall the State, county, or municipality be liable for this or any other fee to said agent or attorney, nor for any court costs, and such costs shall be paid only from a sale or collections to each tract or parcel of land."

The court is of opinion that this proviso in the act of 1901 has no application to the present case, since this is a case of double assessment, and not a case where the suit has been prosecuted to a final decree. Manifestly the object of the legislature in adopting this proviso was to relieve the State, county, and municipality from the payment of any fees to attorneys or agents, or any court costs, and to provide for their payment exclusively from the proceeds of the sale of the tracts or parcels of land involved. As already seen, this is a case of double assessment, wherein the bill was dismissed,

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and there could be no prosecution of such a case for the collection of costs and fees.

Moreover, it appears that the act of 1901 is limited by its terms to back tax attorneys appointed under the act of 1895, and relates entirely "to the delinquent taxes in said back tax attorney's office." The back tax attorney appointed under the act of 1895 only had control of the taxes for the years 1894 and 1895. Section 75, c. 174, p. 369, of said act of 1901 provides as follows:

"That within thirty days after the passage of this act the back tax attorneys appointed under section 80, chapter 120, of Acts of 1895, and that have not already been turned over under the assessment act of 1899, shall, except as hereinafter provided, turn over and deliver to the county trustee all books, papers and documents whatsoever," etc., "in their hands relating to the delinquent taxes in said back tax attorney's office to the end," etc.

In our opinion the proviso to section 78, c. 174, p. 371, Acts 1901, is limited to costs accruing under the bills filed by the back tax attorney under the act of 1895, and as to such costs shall only be paid from the sale of the land. We are of opinion, therefore, the relator is entitled to the relief asked, and the decree of the chancellor is affirmed.

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MOBILE & OHIO RAILROAD COMPANY v. MATTHEWS.

(*Jackson*. April Term, 1905.)

1. ACTION. Joinder of causes of.

Two or more distinct causes of action may be joined in as many different counts of the same declaration, where the different counts are of the same quality or character and are not repugnant or antagonistic to each other.

Case cited and approved: *Bible v. Palmer*, 95 Tenn., 393.

2. SAME. A single tort can be made the basis of but one action.

When a person is injured in his person and property as the several results of a single wrongful act, he has but one cause of action therefor and may declare in different counts for both classes of injuries; and if he fails to so sue for the entire damages sustained, a second suit for the damages omitted will be precluded by the judgment in the first suit.

Cases cited and approved: *Railway Co. v. Brigman*, 95 Tenn., 628; *Shoemaker v. Atkins*, 11 Helsk., 296; *Smith v. Atkins*, 6 Baxt., 318; *Carraway v. Burton*, 4 Humph., 108; *Howe v. Peckham*, 10 Barb. (N. Y.), 656; *Hemstead v. Des Moines*, 63 Iowa, 39.

FROM OBION.

Appeal in error from the Circuit Court of Obion County.—R. E. MAIDEN, Judge.

SWIGGART & SPADLIN and C. G. BOND, for Railroad Company.

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FELIX W. MOORE and LANNON & STANFIELD, for Matthews.

MR. JUSTICE SHIELDS delivered the opinion of the Court.

Plaintiff, Matthews, sued for injuries sustained in his person and property, a buggy and horse, in a collision with one of the defendant's trains at a road crossing, in separate counts in one declaration. The defendant moved to strike the declaration from the file for duplicity, in that the claims for damages to the person and property constituted two distinct causes of action, in which the elements and measure of damages were different, and could not be joined in the same suit. This motion was overruled, and there was judgment for the plaintiff. Defendant has appealed, and assigned the action of the court on its motion, among other things, as error.

The contention of the plaintiff in error is not sound. If the declaration embraced two distinct causes of action, as insisted, it would not be subject to the objection made to it. As said by this court in *Bible v. Palmer*, 95 Tenn., 393, 32 S. W., 249: "It is allowable to join two or more distinct causes of action in as many different counts of the same declaration, when, as in this case, the different counts are of the same quality or character, and not repugnant or antagonistic to each other. And in such cases the court may direct a separate verdict upon each count, or separate trials."

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But in this case there is but one cause of action sued upon. The negligent action of the plaintiff in error constituted but one tort. The injuries to the person and property of the defendant in error were the several results and effects of one wrongful act. A single tort can be the basis of but one action. It is not improper to declare in different counts for damages to the person and property when both result from the same tort, and it is the better practice to do so where there is any difference in the measure of damages, and all the damages sustained must be sued for in one suit. This is necessary to prevent multiplicity of suits, burdensome expense, and delays to plaintiffs, and vexatious litigation against defendants. If necessary to prevent confusion in ascertaining the damages to be recovered for different injuries, separate verdicts may be directed. 2 Chitty's Plead., 850, 860, 910; *Howe v. Peckham*, 10 Barb. (N. Y.), 656; *Hemstead v. Des Moines*, 63 Iowa, 39, 18 N. W., 676; *Shoemaker v. Atkins*, 11 Heisk., 296; *Smith v. Atkins*, 6 Baxt., 318.

Indeed, if the plaintiff fail to sue for the entire damage done him by the tort, a second action for the damages omitted will be precluded by the judgment in the first suit brought and tried. *Southern Ry. Co. v. Brigman*, 95 Tenn., 628, 32 S. W., 762; *Freeman on Judgments*, sec. 241; *Carraway v. Burton*, 4 Hump., 108.

Other assignments of error were overruled in an oral opinion. Judgment affirmed.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF TENNESSEE
FOR THE
EASTERN DIVISION.

KNOXVILLE, SEPTEMBER TERM, 1905.

STATE *et al.* v. MAYOR and ALDERMEN of CITY of KNOX-
VILLE.

(Knoxville. September Term, 1905.)

1. **PUBLIC SCHOOLS.** Recovery by State and county from city for excess of fund received by it upon false reports of scholastic population.

The State and county may, for the use of their respective school funds, recover from a municipal corporation the excess above the proper amount of school funds received by it, through fraud or mistake, upon false and padded reports of its scholastic population, although the fund has been expended for governmental purposes in the maintenance of its schools.

Constitution cited: Art. 11, sec. 12.

Cases cited and approved: Land Co. v. Jellico, 103 Tenn., 320; Ernest v. West Covington, 76 S. W., 1089, 63 L. R. A., 652; Hitchcock v. Galveston, 96 U. S., 341; Louisiana City v. Wood, 102 U. S., 294; Chapman v. Douglass Co., 107 U. S., 348; Moses 115 Tenn.

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v. McFarlan, 2 Burr., 1005; Morville v. Society, 123 Mass., 129; Argenti v. San Francisco, 16 Cal., 282.

2. **SAME.** City board of education enumerators of scholastic population are the agents of the city.

The city board of education, put in charge of the city schools under the city charter and ordinances passed pursuant thereto, and the enumerators appointed by such board to take the census of the scholastic population are the agents of the city, and not of the State. (*Post*, pp. 179-182, 185-192.)

Acts cited and construed: 1873, ch. 25, secs. 2 and 51; 1885 (ex. ses.), ch. 8, secs. 63, 64, and 66.

Cases cited and approved: University v. Knoxville, 6 Bax., 166; Edmondson v. Board, 108 Tenn., 562.

3. **MUNICIPAL CORPORATIONS.** Defined.

A municipal corporation is a body corporate established by law to share in the civil government of the country, but chiefly to regulate the local or internal affairs of the city, town, or district incorporated. (*Post*, p. 191.)

Case cited and approved: University v. Knoxville, 6 Bax., 166.

4. **SAME.** Decree for State and county school funds wrongfully received and expended by city to be satisfied out of general funds.

A decree in favor of the State and county and against a city for the excess of the proper amount of school funds received and expended by it would, like any other judgment or decree, be satisfied out of the general revenues or such as may be derived from a tax imposed to meet the decree, and not from the current school revenues. (*Post*, pp. 192-194.)

5. **INTEREST.** Allowed from date of the filing of the bill, when interest will be allowed on the recovery as shown in the first and fourth headnotes from the date of the filing of the bill. (*Post*, p. 194.)

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FROM KNOX.

Appeal from the Chancery Court of Knox County.—
JOSEPH W. SNEED, Chancellor.

SHIELDS, CATES & MOUNTCASTLE and H. VAN DEVENTER, for complainants.

J. W. CALDWELL, J. W. CULTON, and JOUBOLMON, WELCKER & HUDSON, for defendants.

MR. CHIEF JUSTICE BEARD delivered the opinion of the Court.

The present suit was brought at the instance of the superintendent of public instruction for the State of Tennessee, for and in the name of the State of Tennessee, for its own use and for the use of Knox county, and in the name of that county, by order of its quarterly court, for its own use, and for the use of its scholastic population residing outside of the corporate limits of the city of Knoxville, and by and in the name of the trustee of Knox county, as the legal custodian of the school funds belonging to Knox county, "to recover from the defendant, the mayor and aldermen of the city of Knoxville, for the benefit of the parties entitled thereto, certain school funds which it is alleged the defendant had unlawfully

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obtained from the trustee of Knox county and had misappropriated and illegally converted to its own use."

The bill charges that the defendant, or its agent, the board of education, pretended to take a census of its scholastic population for each of the years from 1897 to 1902 inclusive, and that it made false and padded reports thereof in each of said years to the county superintendent of public instruction for Knox county, and through him and other officers of the State to the trustee of Knox county, upon which it succeeded in drawing a pro rata of the school funds in the hands of the trustee during each of these years far in excess of what it was entitled.

The defendant answered this bill and set up four grounds of defense as follows:

(1) That it did not falsify or pad its reports, and did not draw any money from the trustee of Knox county in excess of what it was entitled to.

(2) That said moneys were received and expended by it in its governmental capacity as an arm of the State government in the support of its public schools, and that no recovery can therefore be had against it for the same in its corporate capacity.

(3) That this money had already been expended by the city of Knoxville in the education of its school children, and that it can neither be recovered from it, nor can the funds due to it in the future be held to replace the funds it has so withdrawn, because it would be an act of injustice to the present and future scholastic pop-

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ulation of the city, who are, and will be, entitled to the benefits of this money.

(4) The defendant pleaded the statute of limitation of three, six, and ten years. This last defense, however, was not relied upon, and therefore will not be further noticed.

Upon the hearing of the cause the chancellor found that there had been a flagrant falsification of the reports of the scholastic population of Knoxville for the years mentioned in the bill, and that upon the basis of these false reports the city had laid claim to and had received from year to year large sums of money from the county trustee as its *pro rata* of the public funds in his hands for distribution among the common schools in the county of Knox, and that these receipts, for the years named, aggregate \$62,797.72, and accordingly he decreed in favor of complainant as against the defendant for this sum with all the costs of the cause.

From this decree both parties appealed. The complainants were dissatisfied because the chancellor failed to allow interest upon each annual receipt of this money, and the city appealed upon the ground that it was in no sense liable for the moneys so received. The cause was heard by the court of chancery appeals, and that court reversed the decree of the chancellor and dismissed the bill, upon a ground which will be hereafter stated and examined.

The court of chancery appeals, agreeing with the chancellor, has found as a fact that for the years named in

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the bill the reports of the scholastic population of the city of Knoxville were grossly falsified by the enumerators of the board of education of the city, and that the board from year to year had certified them to the superintendent of public instruction of the county of Knox as correct, and by him they were certified to the State superintendent of public instruction, and by the latter to the State comptroller, and that this officer had issued, each of the years named, his warrant on the treasurer of the State, payable to the trustee of Knox county, for the city's *pro rata* of the school fund controlled by the State, and that the trustee of Knox county out of the proceeds of these warrants had paid, from time to time, to the city of Knoxville its proportionate part thereof upon the understanding that these reports were honestly made. That court further finds that these exaggerated or padded reports were prepared and furnished by the board of education of the city of Knoxville through agencies of its own creation. On this point the language of that court is as follows: "As a matter of fact, getting at the root of the contention in the case, the city of Knoxville received from the proper public authorities charged with the distribution of the public school funds a larger *pro rata* of these funds than it was entitled to by reason of the false reports as to the number of its scholastic population, which *pro rata* were turned into its general treasury, and thereafter paid out through its board of education to the support of its city schools."

As we understand the theory, on which the defendant

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seeks to maintain the decree of the court of chancery appeals, embraces two main propositions, the first of which, as stated in the words of its counsel, is as follows: "The city, the board of education, the census taker, the county superintendent, and the county trustee were all necessary governmental agencies in handling the school fund, and by well-settled principle of law no one of them can be held for either the misfeasance or the nonfeasance of another."

The second of these propositions is thus stated by the counsel of the appellee: "The fund was appropriated by the agents of the State to the support of the public schools of Knoxville, and merely passed through the hands of the city government to the public use for which it was intended; and as the injury complained of was caused by another agent, or subagent, who in law was the agent of the principal, to wit, the State, the city cannot be called upon a second time to pay out said money because of the wrongful act of said subagent."

As to the first of these propositions, it is true, as is insisted by the appellee, that a municipal corporation possesses two kinds of power, one governmental, or public, in the execution of which it is not answerable for the wrongs of its agents, and the other private, in which latter case it stands as an individual, subject to legal liability for an improper exercise of this power through its employees, resulting in injury to another. Our own reports contain a number of cases which illustrate the dual nature of such a corporation, and recognize, how-

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ever indistinct it may be, that there is a dividing line between its public and its private character. It is unnecessary to refer to these cases as all are familiar to the profession.

We think it equally true that, while the raising of taxes for the public schools in the city of Knoxville was a proper municipal purpose, yet, in the management of these schools, the city was engaged in governmental work. This being the case, the corporation would be exempt from liability for the faulty construction or want of repairs of its school buildings, or the wrongs of its servants employed in this work (*Ernst v. West Covington* [Ky.], 76 S. W., 1089, 63 L. R. A., 652), resulting in injury to a pupil or a stranger, yet we do not think this concession meets the contention of the complainants. They put their case upon the ground that through the fraud of certain of its agents the city has received and appropriated to its own benefit large amounts of money, for several successive years, to which it was not entitled, and upon an implied assumpsit that it is bound to pay back to the complainants, who were entitled to recover the same, these several sums. As a part of this contention, it is insisted by complainants that it is immaterial whether these moneys were received by the city in its governmental or private capacity.

Putting the proposition of complainants in the words of their counsel, it is as follows: "Even if the city received the money in its governmental capacity, the complainants are nevertheless entitled to a decree against it

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for this money. The obligation to do justice rests upon all persons, natural and artificial alike, and, the defendant having obtained this money wrongfully and without authority, the law will compel restitution without regard to what the defendant did with it."

While the proposition is thus broadly stated, yet the argument of the complainants goes no further in the present litigation than to insist that, to the extent of the benefits received by the city from the appropriation of these moneys thus wrongfully received, it is bound to make restitution. It is certainly true, as well supported by authority, if a municipal corporation or other public corporation obtains the money, or the labor, or the property of others, and appropriates the same upon unenforceable contracts, the law, without more, will compel it to respond in a sum equal to the benefits received therefrom. In *Louisiana City v. Wood*, 102 U. S., 294, 26 L. Ed., 153, it is held that, where bonds of a city cannot be enforced because defectively executed, the money paid for them to the city can be recovered. Among the cases there referred to is that of *Moses v. McFarlan*, 2 Burr, 1005, in which it is stated, as a rule of the common law, "that an action lies for money paid by mistake, or upon a consideration which happens to fail, or for money got through imposition." In *Morville v. American Tract Society*, 123 Mass., 129, 25 Am. Rep., 40, it is said: "The money of the plaintiff was taken and is still held by the defendant under an agreement which it is contended it has no power to make, and which, if it had the power to make, it has wholly failed on its part to

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perform. It was money of the plaintiff now in the possession of the defendant, which in equity and good conscience it ought now to pay over and which may be recovered back in an action for money had and received. The illegality is not that which arises where the contract is in violation of public policy or of sound morals, and under which the law will give no aid to either party. The plaintiff himself was chargeable with no illegal act, and the corporation is the only one at fault in exceeding its corporate powers by making the express contract, but only to recover his own money and prevent the defendant from unjustly retaining the benefit of its own illegal act. He is doing nothing which may be regarded as a necessary affirmance of an illegal act."

Hitchcock v. Galveston, 96 U. S., 341, 24 L. Ed., 659; *Chapman v. Douglass county*, 107 U. S., 348, 2 Sup. Ct., 62, 27 L. Ed., 378; *Argenti v. San Francisco*, 16 Cal., 282; and *Land Co. v. Jellico*, 103 Tenn., 320, 52 S. W., 995, all recognize and enforce the principle that a municipality will be made to respond for the value of the benefit conferred upon it, notwithstanding the contract under which the benefit was given and received was unenforceable.

In view of the principle announced by these cases, which seems to be sound both in morals and in law, we agree with the counsel of the complainants that, wherever money is wrongfully received by a municipal corporation from which benefit has accrued to it, it is no

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reply to a claim for restitution that the corporation received the money and appropriated it for governmental purposes, but that to the extent of the benefits received, whether in the discharge of its governmental or private duties, the corporation is bound to respond.

It could hardly be insisted that receiving this fund wrongfully, whether as the result of fraud or innocent error upon the part of the municipality, as its portion due either to its schools, or to it in its corporate capacity for their maintenance, and the fund was still in the custody of the city, that it would not be required to make restitution to the complainants. And further, had the city of Knoxville, upon the receipt of this fund from time to time, instead of appropriating it to its public schools, applied it to the building of market houses, or the construction of streets, or to the support of its police or fire departments, it would hardly be contended in such case that it should not be required to make good the sum so received and applied. If this be true, why then is it not equally bound to do this, having used the fund for the very purpose for which it was intended and received, to-wit, the maintenance of schools within the corporate limits? What difference in the application of the principle does it make that the board of education, or the enumerators acting for the board, who made the false reports, were the agents of the state (if they were such), if, after all, the city took the benefit of the moneys paid over on these false reports? How can the character of these two parties, one or both, affect the liability of the

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city upon the assumption that the city took the benefit ignorantly, or otherwise, of their acts?

But it is said for the defendant that "the department of education of the city is one of its governmental branches engaged in carrying out, for the general welfare of the people, the schools laws of the State." From this, it is insisted, it follows as a corollary that "the city has derived no private benefit or emolument from the funds sued for in this case," and therefore it is contended the principle announced in the cases referred to has no application here.

The constitution of the State, recognizing that "knowledge, learning, and virtue are essential to the preservation of republican institutions," and that the diffusion of the opportunities and advantages of education throughout the different portions of the State would be highly conducive to the promotion of this end, imposed as an express duty upon the general assembly the encouragement of literature and science. As one of the chief means of accomplishing this most important purpose the constitution contemplated the establishment of a common-school system in the State, and provided that the fund, then "known as the common school fund . . . heretofore by law appropriated . . . for the use of common schools, and all such as may hereafter be appropriated, shall remain a perpetual fund for the maintenance of the common schools of the State." Article 11, section 12.

From time to time, both before the adoption of the con-

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stitution of 1870, and since, various acts have been passed by the legislature to enforce the efficiency of the common schools. In 1873, however, there was enacted a general law, the purpose of which is indicated by its title, to wit: "An act to establish and maintain a uniform system of public schools." Chapter 25, p. 39, of the Acts of 1873. By the second section of the act it was provided that "the public school system thus established should be administered by the following authorities, to wit: State superintendent, county superintendent, and district school visitors."

The effect of this act would possibly have been to wipe out the common school system already organized and operating in the various incorporated towns and cities of the State; but to guard against this section 51 provides that none of the provisions of the act should be construed to interfere with the schools or systems thus established, but that all such schools should receive their *pro rata* shares of moneys raised under the provision of the act according to their scholastic population.

While this section left these schools intact, and with the right to share with the common schools of the State in the funds set apart under the constitution as a common school fund, still it did not make them a part of the system organized under the act. It is true that these municipal public schools are established under the authority of the State, and that for convenience in their management, in many cases the legislature has seen proper to create, by acts of incorporation, boards of edu-

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cation to manage and control them, and that there is a reserved power in the State to enlarge or extinguish these boards (*Edmondson v. Board of Education*, 108 Tenn., 562, 69 S. W., 274, 58 L. R. A., 170), yet it does not by any means follow that these schools constitute parts of the system provided for in the act of 1873.

Long prior to 1873 the legislature had incorporated the city of Knoxville, with express power to establish and regulate public schools for the children within its limits.

In 1885 an act was passed by the legislature, entitled "An act to reduce the acts incorporating the city of Knoxville, and the various amendments thereto to one act, and amend the same." Acts 1885, Ex. Sess. p. 48, c. 8. Recognizing the then existence of such schools by sections 63 and 64 of the act it is provided that the board of mayor and aldermen should elect five citizens of the city who are to constitute a board of education, and by the sixty-sixth section that the board of mayor and aldermen should prescribe the duties of this board of education.

It is under the authority of these sections of the charter and ordinances passed in accordance therewith that a board of education was elected and put in charge of the schools of the city, and it was under the authority of this board that enumerators were appointed from time to time to take a census of the scholastic population of the city whose false reports were made the basis of ascer-

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taining the *pro rata* of the public school fund of the State to which the city was entitled.

It is a matter of common knowledge that municipal charters are granted at the instance and for the benefit of communities, speaking through the representatives of their citizenship. So it is not going too far to assume that the citizens of Knoxville, realizing that knowledge and virtue were essential elements of good character, and that common schools tended to foster and encourage the growth of both, in order to make the system then existing more efficient had the legislature to provide that it should be administered by a board of public education. This board, however, was not incorporated or in any sense made independent. To the contrary, it was, under the charter, simply an agency designed to accomplish the best results, and was made absolutely dependent on the creator (the city) for all its rules of government.

That the city understood these common schools were a part and parcel of its corporate system, as much so as its fire or police department, the court of chancery appeals find that in the preparation of its annual budgets there was provided for the support of these schools yearly sums equal to the public school fund turned over to it.

We think the charter of 1885 by clear implication recognizes the duty of the city of Knoxville to maintain a system of common schools for the children within its corporate limits, and for the more successful performance of this duty authorized the placing of this system

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under the direction of the agency already referred to, acting, however, under the dominion and control of the corporation itself. If, then, it was the duty of the city to maintain these schools, and it did receive from the common school fund of the State a larger *pro rata*, whether the result of mistake or fraud of itself or its agent, than it was entitled to, and appropriated the same, why should it not respond in law for this excess?

The second proposition of the defendant already set out, *in extenso*, may be summarized thus: As the wrong complained of was committed by a subagent of the State—that is, the enumerator appointed by the board of education, an agent of the State, by implication authorized to appoint this subagent—the city cannot, therefore, having already paid out this money, be called upon a second time to do this thing. The principle on which this insistence rests is thus stated by Mr. Mechem in his work on Agency: “If the agent employs a subagent for his principal and by his authority, expressed or implied, then the subagent is the agent of the principal and is directly responsible to the principal for his conduct; and, if damage results from the conduct of such subagent, the agent is only responsible in case he has not exercised due care in the selection of the subagent.” Section 196.

The application of this rule to the case in hand depends upon the proper answer to the question, was the board of education, or any one of the census enumerators employed by this board, an agent of the State? We think

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there can be but one answer to this question so far as the board of education is concerned. As has been seen, under the charter it is elected by the corporate authorities of Knoxville and is absolutely subject to their control and dominion. The charter confers no power on it, and prescribes no duties for it. This being so, it results necessarily that the members of that board were answerable alone to these authorities for any abuse of the trust imposed upon them.

In addition, the accepted definition of a municipal corporation, we think, excludes the idea of any relationship of principal and agent between the State and this board. In *East Tennessee University v. Knoxville*, 6 Baxt., 166, it is said that a municipal corporation is a body corporate established by law to share in the civil government of the country, but chiefly to regulate the local or internal affairs of the city, town, or district incorporated. It would be a strange anomaly, indeed, if the principle stated in the above citation from the text of Mr. Mechem should be held to apply to one occupying the position of census enumerator and thus make him the agent of the State. We think the law to be otherwise, and that the board of education appointed as hereinbefore pointed out, and acting, as this board did, for a municipal corporation clothed, as was the city of Knoxville, with the attribute of sovereignty over the people and property within its territorial limits, was the agent of the city, and that neither it nor its enumerator was in any sense the agent of the State. We think, therefore, the princi-

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ple announced by Mr. Mechem has no application to the case at bar.

The court of chancery appeals, disregarding the two contentions of the appellee which we have been considering placed its reversal of the chancellor's decree upon the ground that to grant the prayer of complainants below would work more of mischief than good at this late period of time. On this subject that court says: "The fund having been received and used for educational purposes, can the wrong done the outside children of the county and State be remedied, under our law governing our public school system, without inflicting at this time a greater wrong than the one committed in the first instance? . . . As a matter of fact it is common knowledge that matters of a public nature in similar instances involving the payment and disbursement of moneys raised for the purpose of government, when the transaction has passed to completion, cannot be remedied, although the payment and disbursement inflicted a wrong on certain parties of the public, and whose payment and disbursement would have been averted if it had been sought to do so in the courts before the wrong was completed; and the vital reason is that to remedy by a restoration of the original money status, if it could be done, would result in a greater injury than the original evil. We have been unable to see how the original status can be restored in this case by making the city refund the excess of the school fund it received.

"In the first place, the school children outside the city

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limits entitled to the benefit of this excess of the fund turned over to the city, many of them, at least, it is reasonable to infer, are not in the public schools, especially in districts from which the fund was diverted. In the second place, under the view of the writer, when a public school fund is assessed and collected, it is impressed with a trust in favor of the school children of the several school districts in the State and the public schools of its municipalities, and is apportionable to them under the law according to their number in their respective districts. This being so, the school fund leviable each year in the city of Knoxville for the support of the public city schools is impressed with a trust for the educational benefits of its school children of the current school year. In other words, these children are the real beneficiaries of the fund so raised, and we do not believe that they can rightfully be deprived of it because a portion of the fund that should have rightfully gone to the education of outside children was diverted to the schools of the city attended by their predecessors. . . ."

This argument and conclusion rest upon the assumption that to affirm the chancellor's decree, and hold the city of Knoxville for the aggregate sum which, through it, has been wrongfully diverted from the funds held in trust for school purposes, involves the necessity of making good this diversion by appropriating the current revenues of the city appropriated to the support of its schools. We do not understand that this would result.

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A decree against the city for the amount of this misappropriation would be like any other decree or judgment, to be satisfied out of the general revenues or such as may be derived from a tax imposed to meet the judgment itself.

We do not see how any confusion would follow from this holding, or that the school children of the city would be subjected to any deprivation of school facilities by reason thereof.

It follows, from what has been said, that we cannot agree with the reasoning of the court of chancery appeals, or with the decree which it has pronounced. The decree of that court is therefore reversed, and the decree of the chancellor is affirmed, save that the recovery here will be in favor of the State, for the use of the common school fund of the State and county, as their interests may appear on a reference, for the making of which the case is remanded. Interest from the date of the filing of the bill is allowed. The costs of the cause will be paid by the city of Knoxville.

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**M. D. ARNOLD *et al.* v. MAYOR AND ALDERMEN OF
KNOXVILLE.***

(*Knoxville*. September Term, 1905.)

- 1. TAXATION.** Injunction by taxpayers against special assessments for local improvements under unconstitutional statute.

Injunction is the proper remedy for taxpayers and owners of real estate affected by an unconstitutional statute and city ordinances passed thereunder establishing improvement districts to enjoin proceedings to make special assessments for local improvements therein. (*Post*, pp. 198, 201.)

Case cited and approved: *Norwood v. Baker*, 172 U. S., 292.

- 2. SAME. CONSTITUTIONAL LAW.** Statute authorizing improvement districts in a city, and special assessments to pay for the local improvements, is constitutional.

A statute (Acts 1905, ch. 278) providing for the creation of improvement districts by a municipal corporation within the corporate limits, and providing for special assessments on the property lying therein, abutting thereon, or adjacent thereto, to pay for the improvements, is valid and constitutional, because the special assessments for local purposes so authorized are not taxes within the sense of the constitution (art. 2, sec. 28) requiring all property to be taxed according to value, equally and uniformly throughout the State, and (art. 2, sec. 29) empowering the legislature to authorize the several counties and incorporated towns to impose taxes, for their respec-

*As to necessity of special benefits to sustain special assessments for public improvements, see note to *Re Bonds of Madera Irrigation District* (Cal.), 14 L. R. A., 755.

*As to constitutionality of frontage rule of assessment, see note to *Raleigh v. Peace* (N. C.), 17 L. R. A., 330; also note to *Davis v. Litchfield* (Ill.), 21 L. R. A., 563.

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tive purposes, and according to value, upon the principles established in regard to State taxation; and such an improvement district within the corporate limits, and less than the whole city and embracing only a part of one street, may be validly created by proper city ordinances enacted pursuant to the provisions of such statute.

Acts cited and construed: 1905, ch. 278.

Constitution cited and construed: Art. 2, secs. 28 and 29.

Cases cited and overruled: *Taylor v. Chandler*, 9 Hels., 352; *Reelfoot Lake District v. Dawson*, 97 Tenn., 151.

Cases cited and approved: *Franklin v. Maberry*, 6 Hum., 368; *Washington v. Nashville*, 1 Swan, 177, 180; *Whyte v. Nashville*, 2 Swan, 364; *Nashville v. Berry*, 2 Tenn. Cases, 561, 563; *Louisiana v. Pillsbury*, 105 U. S., 295; *Institution v. Jersey City*, 113 U. S. 506; *Spencer v. Merchant*, 125 U. S., 355; *Railroad v. Decatur*, 147 U. S., 198, 199; *French v. Barber Asphalt Co.*, 181 U. S., 324; *Norwood v. Baker*, 172 U. S., 269; *Tonawanda v. Lyon*, 181 U. S., 389; *Webster v. Fargo*, 181 U. S., 394, 395; *Farm Co. v. Detroit*, 181 U. S., 396; *Schaefer v. Werling*, 188 U. S., 516; *Wright v. Boston*, 9 Cush., 233, 241; *McGonigle v. Allegheny City*, 44 Pa., 118, 121; *Litchfield v. Vernon*, 41 N. Y., 123, 133; *Macon v. Patty*, 57 Miss., 378; *Madera Irrigation District Bond Case*, 28 Pac., 272, 14 L. R. A., 767, 27 Am. St. Rep., 106; *Cain v. Davie Co.*, 86 N. C., 8; *Shuford v. Lincoln Co.*, 86 N. C., 552; *Busbee v. Walker Co.*, 93 N. C., 143; *Raleigh v. Peace*, 110 N. C., 32; *Wilmington v. Yopp*, 71 N. C., 76; *Sears v. Board (Mass.)*, 53 N. E., 138, 43 L. R. A., 836; *Weed v. Boston*, 172 Mass., 28; *Huston v. Tribbetts*, 171 Ill., 547; *King v. Portland*, 38 Or., 402; *Sheley v. Detroit*, 45 Mich., 431.

3. **SAME. SAME.** Same. Such statute is not unconstitutional as deprivation of property without due process of law.

A statute (Acts 1905, ch. 278) providing for city improvement districts and special assessments for improvements therein is not unconstitutional as the taking of property of the landown-

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ers so taxed for public purposes without just compensation and without due process of law. (*Post*, pp. 200, 201, 204, 222, 223.)

Cases cited and approved: *French v. Asphalt Co.*, 181 U. S., 324; *Cain v. Davie Co.*, 86 N. C., 8; *Shuford v. Lincoln Co.*, 86 N. C., 552; *Busbee v. Walker Co.*, 93 N. C., 143; *Raleigh v. Peace*, 110 N. C., 32.

4. **CONSTITUTIONAL LAW.** Contemporary construction long acquiesced in is of much weight, still plain and palpable error will be corrected.

While the contemporary construction of a constitutional provision, which has been long acquiesced in, is entitled to great weight in determining the meaning of the same; still if such construction is plainly and palpably erroneous the court will correct it (*Post*, pp. 201, 202.)

Case cited and approved: *Coleman v. Campbell*, 3 Tenn Cases, 355, 364, 365.

FROM KNOX.

Appeal from the Chancery Court of Knox County.—
JOSEPH W. SNEED, Chancellor.

JOHN W. GREEN, for complainants.

J. W. CULTON, J. W. CALDWELL, HORACE VAN DE-
VENTER, and CLARENCE W. BARBER, for defendants.

MR. JUSTICE WILKES delivered the opinion of the Court.

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This cause questions the constitutionality of chapter 278, p. 585, of the Acts of 1905.

The act, in substance, provides for the creation of improvement districts in the city of Knoxville, and the payment of the expenses incurred thereby for public improvements by special assessments on abutting property.

The caption of the act, which sets out its purpose, is as follows:

"An act to provide for the creation of improvement districts for the purpose of opening, widening, extending, grading, curbing, guttering, paving, gravelling, macadamizing, parking, laying permanent sewers on, upon, or in any street, highway, avenue or alley, within the corporate limits of any town in this State, having a population of not less than 32,000, nor more than 75,000 inhabitants, according to the federal census of 1900, or any subsequent census; to provide for the appointment of improvement district commissioners for said improvement districts; to provide a method of assessing a part of the cost of said improvements upon the land lying in, abutting on or adjacent to said improvement districts, and of paying for said improvements; and to authorize the issuance of bonds, or certificates to pay for the same, and the redemption of said bonds."

The bill was filed by two taxpayers and citizens of Knoxville, owning real estate affected by this act and the ordinances of the city passed thereunder establishing improvement districts, to enjoin proceedings to make assessments as the act provides.

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Complainants allege that they have paid all taxes legally assessed or assessable against their property, and they charge that the special assessment attempted to be levied for street improvements is illegal, because unconstitutional, in that it violates article 2, section 28 of that instrument, which provides that "all property shall be taxed according to its value, that value to be ascertained in such manner as the legislature shall direct, so that taxes shall be equal and uniform throughout the State."

The text of the constitutional provision is as follows:

Article 2, section 28: "All property, real, personal or mixed, shall be taxed . . . All property shall be taxed according to its value, that value to be ascertained in such manner as the legislature shall direct so that taxes shall be equal and uniform throughout the State. No species of property upon which a tax may be collected, shall be taxed higher than any other species of property of the same value, but the legislature shall have power to tax merchants, peddlers, and privileges, in such manner as they may from time to time direct."

Section 29. "The general assembly shall have power to authorize the several counties and incorporated towns in this State, to impose taxes for county and corporation purposes respectively, in such manner as shall be prescribed by law; and all property shall be taxed according to its value, upon the principles established in regard to State taxation."

The bill is filed to enjoin the further execution of the act, and various allegations are made to point out where-

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in the act is invalid, unjust, oppressive, and unconstitutional.

It is alleged that property adjacent to complainants', but outside the improved districts, will be benefited not less than the property within them, but will be exempt from the special tax.

It is insisted that any improvement of a public nature in the city should be paid for by all the property owners of the city.

It is alleged that the act in question is illegal for the further reason that the improvements on the real estate assessed under it are exempt from the operation thereof, and because the assessments do not extend to personal property, and because the act imposes burdens of taxation which are not equal and uniform, and do not apply to all property.

It is denied that the city had the right to "divide itself wholly, or partly, into improvement districts," and impose taxes on persons owning property in such districts, which are not imposed upon others, or to impose a different rate of taxation upon property owners in different districts.

They allege that under said act the defendant is taking their property for public purposes without just compensation and without due process of law, and is thereby attacking their privileges and immunities as citizens of the United States, and is casting a cloud upon their titles.

Finally, they allege that the city is using all possible

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haste to put said act and the ordinances passed in pursuance of it into operation; and they prayed that said act and ordinances may be decreed to be unconstitutional and void, and for preliminary and perpetual injunction.

The bill was demurred to by the city, and the demurrer was overruled, and the city has appealed.

No question is made but that injunction is the proper remedy, if complainants are entitled to relief upon the ground that the assessment is illegal and invalid. See *Norwood v. Baker*, 172 U. S., 292, 19 Sup. Ct., 187, 43 L. Ed., 443.

The sole question presented in this case is the validity of laws authorizing special assessments for local improvements.

It is insisted by complainants that this question has been settled in this State for more than thirty years; the leading case being that of *Taylor, McBean & Company v. Chandler*, reported in 9 Heisk., 349, 24 Am. Rep., 308, and since followed in a number of cases, the most important being the case of *Reelfoot Lake v. Dawson*, 97 Tenn., 151, 36 S. W., 1041, 34 L. R. A., 725.

It is conceded that, if the doctrine laid down in these cases and on which they rest is adhered to, the constitutionality of the present act cannot be maintained, and we are earnestly asked to overrule them or modify them.

Counsel for the city, in making this request of the court, does so with due deference to the rule laid down in *Coleman v. Campbell*, 3 Tenn. Cas., 355, that contemporary construction of a constitutional provision, which has

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been long acquiesced in, is entitled to great weight in determining the meaning of the same.

This court recognizes to its fullest extent the necessity for stability, consistency, and a firm adherence to the doctrine of *stare decisis* in passing upon and construing any provision of the organic law; but, if an error has been committed, and becomes plain and palpable, the court will not decline to correct it, even though it may have been re-asserted and acquiesced in for a long number of years.

The case of *McBean v. Chandler*, above referred to was decided by judges who have had no superiors in our judicial history, and after a most painstaking and laborious consideration, and a presentation by an array of counsel of ability rarely to be found in any case and the opinion is able, comprehensive, exhaustive, and learned.

Granting the premises therein laid down as the controlling feature in the case, and the conclusion reached is inevitable and irresistible.

This controlling feature may be briefly stated to be that special assessments for local purposes fall within the meaning of taxes in the sense in which that term is used in our constitution, and hence they cannot be maintained, because they are not imposed upon the entire property of a State, county, or municipality, but only upon real estate in a particular locality, that they are not equal and uniform within the State, county, or municipality, as the case may be, and not laid according to value.

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If we grant that special assessments for local purposes fall within the provisions of article 2, sections 28 and 29, of the constitution, and are taxes within the meaning of those sections, then they cannot be sustained as constitutional, and the present act must be declared invalid.

The *McBean Case*, and the other cases based upon it, especially the *Reelfoot Lake Case*, are founded upon the ruling that special assessments do fall within the provisions of these sections, and the provisions of the statute authorizing them not being in conformity with the fundamental principle of equality, uniformity, and generality, such statute is invalid.

This question is therefore the crucial one in the case; and with it decided there remains but little ground for controversy.

Briefly stated, it was held in the *McBean Case* that taxes could be laid for public purposes only and according to some rule of apportionment, and that equality was of the essence of the power. Hence a State burden of taxation could not be laid upon any territory less than the whole State, a county tax must be laid upon the entire county, and a city tax upon the whole of the city, and these requirements are denominated as fundamental.

It was further held that the constitution of Tennessee does not recognize the principle that taxation may be apportioned according to benefits received, but that all taxation must be imposed upon the fundamental principles of equality and uniformity, and this, necessarily and expressly, excludes the power to levy a tax upon any

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other basis or principle, either for general or local purposes.

It was also held that the constitutional provision provided the only legitimate means and modes of providing revenues for the State, counties, and municipal corporations, and such revenues could only be raised under that authority, and in the manner prescribed by it, and that no change in name, such as calling the imposition a special assessment, could change the essential nature of the thing, so as to escape constitutional regulation by a mere play upon words, or by giving the laying of taxes a different name or designation.

It was further held, that apart from the exercise of the taxing power, property cannot be taken to satisfy what is called a "special assessment," unless under the exercise of eminent domain, and then by making just compensation to the individual, and not to the public generally.

It was also held that an assessment for improvements, based on the frontage of lots on the streets to be improved, was absolutely void, and contained no element of equality and uniformity, if considered as a tax, and gave no compensation to the lot owners, if considered as an exercise of eminent domain.

The text-books on constitutional and municipal law present an unbroken line in opposition to the doctrines thus laid down, and are based upon the view that there is a material and fundamental difference between special assessments for local purposes and general taxation for

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governmental purposes, as provided in the constitutions of the various States.

Mr. Dillon, in his work on Municipal Corporations (volume 2, section 761), says, in substance:

"A local assessment upon property immediately and specially benefited by a local improvement of a street is distinguishable in many respects from a tax levied for the general purposes of the State or the general purposes of the municipality.

"The soundness or reasonableness of this proposition is recognized by the legislation of parliament, which has constantly distinguished between taxes for the benefit of the whole kingdom and those laid for the improvement of a particular district. It is also recognized by the legislation of perhaps every State in the Union. Hence, as is elsewhere shown, a statute exemption of designated property from 'taxation' does not include an exemption for local assessments. Hence, also, as we have already seen, provisions in State constitutions concerning equality of 'taxation' are generally, although not invariably, held not to apply by their intrinsic force to local assessments."

Smith, in his treatise on Municipal Corporations (section 1228a), says:

"A special assessment, or 'local assessment,' as it is frequently called, is a species of taxation imposed by municipalities for the purpose of local improvement, and is based upon the assumption that the property in the locality of a proposed improvement will be specially and peculiarly benefited thereby, by which a duty is imposed

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upon the owners to contribute an amount in payment of the cost of improvement equal to the benefits received. There are manifestly many improvements in which the inhabitants of a municipality in the aggregate are but remotely interested, but which add materially to the value of the neighboring property as well as to the convenience, safety, and enjoyment of local residents. Special assessments rest upon the ground that special burdens may be imposed for special or peculiar benefits accruing from public improvements. It is obvious that in a matter of local improvement a burden ought not to be imposed on the whole for the benefit of a few. In other words, general taxation for merely local purposes is not only unjust but is not a legitimate function of government."

Judge Cooley (volume 2 [3d Ed.] 1153) says "Special assessments are a peculiar species of taxation standing, apart from the general burdens imposed for State and municipal purposes, and governed by principles that do not apply universally. The general levy of taxes is understood to exact contributions in return for the general benefits of government and it promises nothing to the person taxed, beyond what may be anticipated from an administration of the laws for individual protection and the general public good. Special assessments on the other hand, are made upon the assumption that a portion of the community is to be specially and peculiarly benefited in the enhancement of the value of property peculiarly situated as regards a contemplated expenditure of public funds, and in addition to the general levy, they de-

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mand that special contributions, in consideration of the special benefits, shall be made by the persons receiving it. The justice of demanding the special contributions is supposed to be evident in the fact that the persons who are to make it, while they are made to bear the expense of a public work, are at the same time to suffer no pecuniary loss thereby; their property being increased in value by the expenditure to an amount at least equal to the sum they are required to pay. This is the idea that underlies all these levies."

Judson on Taxation, section 355, says:

"Special assessments for local improvements are made under the sovereign power of taxation, yet they are clearly distinguished from regular tax levies made under state authority for general public purposes. Taxes proper, or general taxes, it was said by the supreme court, proceed upon the theory that the cost of government is a necessity that it cannot continue without means to pay its expenses, that for those means it has the right to compel all citizens and property within its limits to contribute, and that for such contribution it renders no special benefit, but only secures to the citizen that general benefit, which results from the protection of his person and property and the promotion of those various schemes which have for their object the welfare of all. On the other hand, special assessments, or special taxes, are justified by the principle that when a local improvement enhances the value of neighboring property that property should pay the expense. Special assessments are made

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upon the assumption that a portion of the community will be specially and peculiarly benefited by the enhancement of the value of property peculiarly situated as regards the contemplated expenditure of public funds, and in addition to the general levy, special contributions in consideration of the special benefit are required from the party specially benefited."

1 Desty on Taxation, p. 4, says:

"The law makes a plain distinction between taxes which are burdens imposed upon persons or property to raise money for public purposes, and assessments for city, and village improvements, which are not regarded as burdens, but as an equivalent or compensation for the enhanced value which the property of the person assessed has derived from the improvement."

In Elliott on Roads and Streets (2d Ed.), section 543, it is said:

"A distinction is made between local assessments and taxes levied for general revenue purposes. The question has been before the courts time and time again, and the almost unruffled current of judicial opinion is that an assessment for a local improvement is not a tax within the meaning of the constitutional provisions requiring uniformity of taxation. Local assessments are not ordinary taxes levied for the purpose of sustaining the government, but they are charges laid upon the individual property because the property upon which the burden is imposed receives a special benefit which is different from

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the general one, which the owner enjoys in common with others as a citizen of the commonwealth."

In 25 Am. & Eng. Ency. Law, pp. 1168, 1169, it is said:

"A special assessment is materially different in its nature from a tax. This, where there is an exemption from 'taxation,' such exemption is limited to taxation for general governmental and municipal purposes, and does not extend to or include special assessments. Similarly, constitutional provisions that all taxes shall be equal and uniform apply only to general taxation, and have no application to local assessments. . . . The power of the legislature to authorize the levy of special assessments upon real property to pay for public improvements, according to the special benefits inuring to the property by reason of the making of the improvements, is universally acknowledged. Such assessments are levied in the exercise of the power of taxation, and not in the exercise of the power of eminent domain. The foundation of the levy is the benefit conferred upon the property assessed by the public improvement, and the amount of the assessment cannot exceed the amount of such benefit."

The same doctrine is laid down in McQuillin on Municipal Ordinances, section 522 et seq., and also in 1 Hare's Am. Const. Law, 301.

Leaving the realm of the text-writers, and coming to the adjudications of the courts:

We find that, with the exception of Tennessee, and possibly South Carolina, from the supreme court of the

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United States, through an unbroken line of more than forty States, the legality and validity of special assessments for local purposes has been sustained.

They have been upheld in the supreme court of the United States (*Provident Institution v. Jersey City*, 113 U. S., 506, 5 Sup. Ct., 612, 28 L. Ed., 1102; *Tonawanda v. Lyon*, 181 U. S., 389, 21 Sup. Ct., 609, 45 L. Ed., 908; *Webster v. Fargo*, 181 U. S., 394, 21 Sup. Ct., 623, 645, 45 L. Ed., 912; *Cass Farm Co. v. Detroit*, 181 U. S., 396, 21 Sup. Ct., 644, 645, 45 L. Ed., 914, 916, and in the following States: Alabama, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, Utah, Virginia, Vermont, Washington, West Virginia, Wisconsin.

A full discussion of the subject and collation of the cases from the supreme court of the United States and the supreme courts of the several States will be found in 2 Cooley on Taxation, from page 1184 to page 1300; also in 25 Am. & Eng. Ency. Law, from page 1168 to page 1180, inclusive. See, also, Ingersoll on Public Corporations, section 113.

Quite a full summary of the constitutions of the different States will be found in Cooley on Taxation (3d Ed.), beginning on page 1184, vol. 2, of the edition of 1903.

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Of these States, Arkansas, Illinois, Minnesota, and Nebraska have constitutional provisions authorizing special assessments, although in Arkansas and Illinois they were recognized before the adoption of the present constitutions.

Florida, Kansas, and Wisconsin have constitutions which require equality and uniformity, but do not require taxation according to value.

Constitutions requiring taxation to be uniform within certain territorial limits or on the same class of subjects are Colorado, Georgia, Missouri, Nebraska, New Hampshire, Pennsylvania, and Virginia.

Constitutions requiring equality, uniformity, and taxation according to value are Arkansas, Georgia, Indiana, Louisiana, South Carolina, Tennessee, Texas, West Virginia, Michigan, and Mississippi.

Constitutions requiring taxation according to value, with or without uniformity and equality, are Alabama, Arkansas, California, Georgia, Indiana, Kentucky, Louisiana, Maine, Michigan, Mississippi, Missouri, Nebraska, North Carolina, North Dakota, Ohio, Oregon, South Carolina, Texas, Washington, and West Virginia.

It will be seen that there are three constitutions requiring uniformity or equality, or both, and not expressly, taxation by value, all of which have been construed as permitting special assessments, although the rule is qualified in Wisconsin; second, that there are ten constitutions requiring equality, uniformity, and taxation according to value, eight of which have been con-

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strued as permitting special assessments, the exceptions being South Carolina and Tennessee; third, that there are twenty-one constitutions which expressly require taxation according to value, nineteen of which have been construed as permitting special assessments, the exceptions being South Carolina and Tennessee.

While special assessments are in the nature of taxation, still they are not taxation for general governmental purposes, in the sense provided for in the constitution. They are different in many respects. Some of these differences are pointed out in the cases.

Thus exemptions which apply in cases of governmental taxes do not extend to special assessments. Special assessments do not recur annually, or at stated periods, but are imposed only as occasion requires. Special assessments are levied alone on real estate, and not upon personal property. There are numerous distinctions pointed out in the cases. 25 Am. & Eng. Ency. Law (2d Ed.), pp. 1168, 1169, and authorities there cited.

By an unbroken line of authorities, except Tennessee, it has been held that the legislature may authorize municipalities to make such assessments.

It was so held in Arkansas, California, Colorado, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Nebraska, New Jersey, New York, Ohio, Oregon, Pennsylvania, South Carolina, Texas, Vermont, and Wisconsin, and in other States. See the cases collated in 25 Am. & Eng. Ency. Law (2d Ed.), p. 1170.

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And it is likewise so held in the supreme court of the United States. *Id.*

The constitutionality of such assessments has been attacked and upheld in a large number of the States of the Union, and in the supreme court of the United States. See a collation of authorities in 25 Am. & Eng. Ency. Law (2d Ed.), pp. 1171, 1172.

The cases hold that such assessments, based upon a special benefit accruing to the assessed property, do not fall within the constitutional inhibition against taking private property for public use without compensation. See the authorities collated in 25 Am. & Eng. Ency. Law (2d Ed.), p. 1172.

It is likewise universally held that grading, regrading, paving, and repaving streets are purposes for which special assessments may be made by a city or town, and so, also are curbing, guttering, constructing sidewalks, and many other works of improvement. See the doctrine fully discussed, and the authorities collated in 25 Am. & Eng. Ency. Law (2d Ed.), pp. 1177-1183, inclusive.

Special assessments are based upon theory that property assessed will be specially benefited thereby above the benefits received by the public at large; and, while the results may not be such as are anticipated, still the principle holds good. And it is likewise held that the burden may be apportioned between the public and the property benefited, and between the property owners themselves, according to actual benefits expected, or according to value, or, in some jurisdictions, ac-

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ording to area or frontage, as the legislature may direct.

The most equitable plan of apportionment appears to be an assessment according to value and benefits received, and it has been held that in assessments based upon value, the worth of the improvements, should be deducted. These features of the case are also discussed fully in 25 Am. & Eng. Ency. Law (2d Ed.), pp. 1197-1201, inclusive, and the cases there collated.

It is well to remark that the power to assess is not unrestricted as to amount; but must be measured by the benefits received, or reasonably anticipated, and the property owner must have an opportunity to be heard in regard to the assessment. 25 Am. & Eng. Ency. Law (2d Ed.), pp. 1194, 1195, 1211-1228, inclusive.

As to the other details of making such assessments, to what extent they may go what provisions may be valid, and what not, we refer again to the excellent article in 25 Am. & Eng. Ency. Law (2d Ed.), pp. 1166-1245.

These details are not now before us, but we have before us only the general question of the constitutional right to make special assessments for local purposes.

In view of the conflict between our own cases and that of other states, it is proper to refer to some of the latter to show the theory upon which such assessments have been upheld. We can refer to only a few cases by way of illustration.

In *Spencer v. Merchant*, 125 U. S., 355, 8 Sup. Ct., 926, 31 L. Ed., 763, decided in 1887, the court said:

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"The legislature in the exercise of its power of taxation has the right to direct the whole or a part of the expense of a public improvement, such as the laying out, grading or repairing of a street, to be assessed upon the owners of lands benefited thereby; and the determination of the territorial district which should be taxed for a local improvement is within the province of legislative discretion."

In *Louisiana v. Pilsbury*, 105 U. S., 295, 26 L. Ed., 1090, it is said:

"It is impossible to apply to the varying wants of a municipality the rule invoked with reference to taxation for State purposes on property throughout the State, without producing the very inequality which that rule was designed to prevent. There would often be manifest injustice in subjecting the whole property of a city to taxation for an improvement of a local character. The rule that he who reaps the benefits should bear the burden must in such cases be applied."

In *Illinois Central R. R. v. Decatur*, 147 U. S., 198, 199, 13 Sup. Ct., 293, 294, 37 L. Ed., 132, it is said:

"Special assessments or special taxes proceed upon the theory that when a local improvement enhances the value of neighboring property that property should pay for the improvement. In *Wright v. Boston*, 9 Cush., 233, 241, Chief Justice Shaw said: 'When certain persons are so placed as to have a common interest among themselves, but in common with the rest of the community, laws may justly be made providing

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that, under suitable and equitable regulations, those common interests shall be so managed that those who enjoy the benefits shall equally bear the burden.' In *McGonigle v. Allegheny City*, 44 Pa., 118, 121, is this declaration: 'All these municipal taxes for improvement of streets rest for their reason upon the enhancement of private properties.' In *Litchfield v. Vernon*, 41 N. Y., 123, 133, it was stated that the principle is 'that the territory subjected thereto would be benefited by the work and change in question.' In *Cooley on Taxation* (page 416, c. 20, par. 1) the matter is thus discussed by the author: 'Special assessments are a peculiar species of taxation, standing apart from the general burdens imposed for State and municipal purposes, and governed by principles that do not apply generally. The general levy of taxes is understood to exact contributions in return for the general benefits of government, and it promises nothing to the persons taxed beyond what may be anticipated from an administration of the laws for individual protection and the general public good. Special assessments, on the other hand, are made upon the assumption that a portion of the community is to be specially and peculiarly benefited, in the enhancement of the value of the property peculiarly situated as regards a contemplated expenditure of public funds, and, in addition to the general levy, they demand that special contributions, in consideration of the special benefit, shall be made by the person receiving it. The justice of demanding the special contributions is supposed to be

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evident in the fact that the persons who are to make it, while they are made to bear the cost of a public work, are at the same time to suffer no pecuniary loss thereby; their property being increased in value by the expenditure to an amount at least equal to the sum they are required to pay. This is the idea that underlies all these levies. As in the case of all other taxation, it may sometimes happen that the expenditure will fail to realize the expectation on which the levy is made, and it may thus appear that a special assessment has been laid when justice would have required the levy of a general tax, but the liability of a principle to erroneous or defective application cannot demonstrate the unsoundness of the principle itself, and that which supports special assessments is believed to be firmly based on reason and justice.'

"These distinctions have been recognized and stated by the courts of almost every State in the Union, and a collection of the cases may be found in any of the leading text-books on taxation."

In *Webster v. Fargo*, 181 U. S., 395, 21 Sup. Ct., 624, 45 L. Ed., 912, it is said:

"But we agree with the supreme court of North Dakota in holding that it is within the power of the legislature of the State to create special taxing districts, and to charge the cost of a local improvement, in whole or in part, upon the property in said district, either according to value, or superficial area, or frontage."

The constitution of North Dakota requires taxation to

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be by uniform rule, to extend to all property, and to be according to its true cash value, and thus the decision in *Webster v. Fargo* applies to requirements fully as strong as those in our own constitution. Cooley on Taxation (3d Ed.), p. 1194.

In *Macon v. Patty*, 57 Miss., 378, 34 Am. Rep., 451, 2 Cooley on Taxation (3d Ed.), p. 1154, it is said:

"A tax is levied on the whole State or a known political subdivision, as a county or a town. A local assessment is levied on the property situated in a district created for the express purpose of the levy, and possessing no other function, or even existence, than to be the thing on which the levy is made. A tax is a continuing burden, and must be collected at stated short intervals for all time, and without it government cannot exist. A local assessment is exceptional, both as to time and locality. It is brought into being for a particular occasion, and to accomplish a particular purpose, and dies with the passing of the occasion and the accomplishment of the purpose. A tax is levied, collected, and administered by a public agency, elected by and responsible to the community upon which it is imposed. A local assessment is made by an authority *ab extra*. Yet it is like a tax, in that it is imposed under an authority derived from the legislature, and is an enforced contribution to the public welfare, and its payment may be enforced by the summary method allowed for the collection of taxes. It is like a tax, in that it must be levied for a public purpose, and must be apportioned by some reasonable rule among

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those upon whose property it is levied. It is unlike a tax, in that the proceeds of an assessment must be expended in an improvement from which a benefit clearly exceptive and plainly perceived must inure to the property upon which it is imposed."

In the case of the *Bonds of the Madera Irrigation District* the supreme court of California approves the holding in an earlier case, as follows:

"It is equally clear that those clauses which provide that taxation shall be equal and uniform throughout the State and prescribe the mode of assessment, and the persons by whom it shall be made, and that all property shall be taxed, have no application to assessments levied for local improvements." 28 Pac., 272, 14 L. R. A., 767, 27 Am. St. Rep., 106."

On the same page the California court, apparently, approved the doctrine that assessment for local improvements may be made according to the value of the property; citing cases from Massachusetts, Kansas, Oregon, Ohio, and Missouri.

In *Raleigh v. Peace*, a North Carolina case (110 N. C., 32, 14 S. E., 521), also reported in 17 L. R. A., 332, it is said:

"These assessments are not to be confounded with the exercise of the right of eminent domain (Cooley, Const. Lim., 498; 2 Dill. Mun. Corp., 738; Lewis, Em. Dom., 4), and it is also to be observed that while they are taxes in a general sense, in that the authority to levy them must be derived from the legislature, they are nevertheless

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not to be considered as taxes falling within the restraints imposed by article 5, section 3, of the constitution, although the principle of uniformity governs both. *Shuford v. Lincoln County Com'rs*, 86 N. C., 552; *Cain v. Davie County Com'rs*, Id., 8; *Busbee v. Wake County Com'rs*, 93 N. C., 143; *Cooley*, Const. Lim., 498; 2 Dill., Mun. Corp., 755.

The principle deducible from the foregoing quotations finds a striking illustration in the facts of the present case. The district improved by the pavement embraces only a part of one street; and, while the pavement may add very greatly to the convenience and comfort of all of the citizens, it at the same time confers upon the abutting real property an enhanced pecuniary value out of all proportion to the benefits inuring to the public at large. Would it be just that all should be taxed alike, and that the owner of property in a remote part of the city be compelled to contribute as much towards the particular improvement as those whose lands are thus peculiarly benefited? This would savor very much of the "forced contributions of the olden time, which are so generally denounced as obnoxious to the principles of free government; and the bare statement of the proposition shocks all sense of justice, and furnishes its own refutation. It is therefore but pre-eminently just, as well as the duty of the lawmaking power, to provide for an equitable adjustment of such burdens in proportion to the benefits conferred; and it is for the very purpose, as we have seen, of accomplishing this end, and of pre-

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venting so great a perversion of the taxing power that these local or special assessments are almost universally resorted to. It is true that the power to levy such assessments is sometimes abused, and that some of the methods adopted have been judically condemned, but the existence of the power itself is as well established as it is possible by judicial decision to establish any legal principle whatever. *Wilmington v. Yopp*, 71 N. C., 76; *Cain v. Davie County Com'rs*, and *Busbee v. Wake County Com'rs*, supra; 2 Dill., Mun. Corp., 761; Cooley, Const. Lim., 506; 1 Hare, Am. Const. Law, 301; Elliott, Roads & Streets, 370.

In *Sears v. Board of Aldermen* (Mass.), 53 N. E., 138, 43 L. R. A., 836, it is said:

"In the last analysis the assessment is not laid as a part of the burden of public expenditure put upon the land; for the burdens which are strictly public are to be shared proportionally by all the people, according to the value of their taxable property. It is rather in the nature of a diminution of that which at first is a public burden, by subtracting from it the amount of the special enhancement of value of private property, from the expenditure of public money in part for its benefit. It is taxation in the sense that it is a distribution of that which is originally a public burden, growing out of an expenditure primarily for a public purpose. While these assessments must be founded upon benefits, the courts have generally recognized the difficulty, and in many cases the impracticability, of attempting to estimate benefits to

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estates one by one without some rule or principle of general application which will make the assessments reasonable and proportional, according to the benefits. Accordingly the determination of such a rule or principle by the legislature itself, or by the tribunal appointed by the legislature to make the assessments, has commonly been upheld by the courts. If, however, its effect plainly is to make an assessment upon any estate substantially in excess of the benefit received, it is set aside. *Weed v. Boston*, 172 Mass., 28, 51 N. E., 204, 42 L. R. A., 642; *Village of Norwood v. Baker*, 172 U. S., 269, 19 Sup. Ct., 187, 43 L. Ed., 443. Assessments of special taxes by an estimate of the particular benefits to each lot, by measurement of the amount of frontage upon a street or sewer, by the measurement of the area of the lots, and by a valuation of the property, have all been sustained."

The supreme court of Illinois has expressed itself as follows:

"Special assessments like this, although levied through the exercise of the taxing power, are not regarded as such ordinary taxes, but as an equivalent for benefits in the increased value of the property." *Huston v. Tribbetts*, 171 Ill., 547, 49 N. E., 711, 63 Am. St. Rep., 275.

In *French v. Barber Asphalt Co.*, 181 U. S., 324, 21 Sup. Ct., 625, 45 L. Ed., 879, it is said:

"The apportionment of the entire costs of the street pavement upon the abutting lots according to their frontage, without any preliminary hearing as to benefits, may be authorized by the legislature, and this will

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not constitute the taking of property without due process of law."

In *King v. Portland*, 38 Or., 402, 63 Pac., 2, 55 L. R. A., 817, it is said:

"The principle upon which is based the authority to take money as a tax for public use is that the taxpayer receives, or is supposed to receive, a just remuneration in the protection which the government affords to life, liberty, and property, and in the increase in the value of possessions which comes from the use to which the money raised by the tax is applied. *Cooley*, Const. Lim. (6th Ed.), 613. Local or special assessments for local improvements stand upon a different basis. They are made and sustained upon the assumption that a prescribed portion of the community is to be especially benefited, in the enhancement of the value of the property peculiarly situated, as regards the proposed expenditure of the funds to be raised by the assessment. It is but a demand of simple justice that special contributions in consideration of special benefits should be made by those receiving the benefits, but such contributions ought not, by the same demand of justice, to be enforced in any case beyond the benefits received. *Cooley*, Taxation (2d Ed.), 606. Such an assessment is not in conflict with the provision of our State constitution requiring that 'all taxation shall be equal and uniform.'"

In *Cass Farm v. Detroit*, 181 U. S., 396, 21 Sup. Ct., 644, 645, 45 L. Ed., 914, 916, it was said:

"An assessment of the cost of paving upon abutting

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property in proportion to the frontage of such property, when authorized by the city charter, and ordinances is not in violation of the constitution of the United States."

In the opinion it is said:

"The State supreme court disposed of this contention in the following language: 'In paving cases the rule has been settled in this State by many decisions that it is competent for the legislature to authorize the cost of paving streets to be assessed upon the abutting property according to frontage.'"

It was said by Mr. Justice Cooley, in *Sheley v. Detroit*, 45 Mich., 431, 8 N. W., 52: "We might fill pages with the names of cases decided in other States which have sustained assessments for improved streets, though the apportionment of the cost was made on the same basis as the one before us. If anything can be regarded as settled in municipal law in this country, the power of the legislature to permit such assessments and to direct an apportionment of the cost by frontage should by this time be considered as no longer open to controversy. Writers on constitutional law, on municipal law, and on the law of taxation have collected the cases and have recognized the principle as settled; and, if the question were new in this State, we might think it important to refer to what they say, but the question is not new. It was settled for us thirty years ago."

In *Schaefer v. Werling*, the supreme court of the United States declared the effect of the Indiana statute, which was construed in that case, to be as follows:

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"It is predicated on the assumption that, as a rule, property along the line of a street improvement will be equally benefited; that, as a rule, property fronting upon a street, foot by foot, will be of equal value, and should therefore be equally assessed." *Schaefer v. Werling*, 188 U. S., 516, 23 Sup. Ct., 449, 47 L. Ed., 570.

Similar holdings from other States and from the supreme court of the United States might be indefinitely multiplied.

Suffice it to say there is not a dissent upon the general question, except in the case of Tennessee, and possibly South Carolina, and even the latter is uncertain, if not with the majority.

It will be noted that the cases place the construction of pavements under the same power.

Our own court has held that property owners may be compelled to lay pavements in front of their premises, or pay the costs of the same, if built by the city.

The leading case is *Mayor v. Maberry*, 6 Humph., 368, 44 Am. Dec., 315, in which the power to compel the building of pavements was based upon the duty of the property owner to perform the work for the comfort of the citizen, and was in the nature of a removal of a nuisance. This was in 1845.

It was followed approvingly by *Washington v. Mayor*, 1 Swan, 180, in 1851; and put on the ground that it was a work required for the public good, but which, at the same time, enhanced greatly the value of the property thus improved, and might be demanded of the citizen as

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a matter of principle, as well as of necessity, just as the inhabitants of the county may be compelled to keep up the public roads, or a militia man can be compelled to serve on the militia, or patrol his neighborhood.

The court in this case says, tersely:

"We can scarcely find in the exercise of the sovereign authority any subject in relation to which public burdens are imposed in which there is much nearer approach to equality than exists in the operation of the law in question. We think, therefore, it is constitutional, and conferred on the corporation power to make the by-laws in question."

And this was said conceding that inequality might arise, and burdens be created in putting the act and ordinances in force and effect.

This, as well as the original case, was approved and followed in *Whyte v. Mayor*, 2 Swan, 364, and was reaffirmed in *Mayor v. Berry*, 2 Tenn. Cas., 563.

In that case it is said:

"The ordinance, pursuing the legislative grant, requires a duty to be performed for the benefit, health, well-being, and comfort of the citizens . . . including the owner of the property. The pavement adds to the convenience and comfort of all who pass that way; the owner of the lot sharing largely in the advantage afforded, and deriving an additional advantage in the appreciation of the value of his property, still further increased by other walks and pavements made in front of other lots in that part of the city.

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"It is for the benefit of all the citizens that such grants are made to the city authorities, and it is only so long as they are confined to benefits that the law will allow them.

"When they cease to be exercised for the benefit and comfort of the citizen and to promote the welfare of the community, and become oppressive and unreasonable, destroying the value of the property to the owner, or, as in the *McBean Case*, appropriating the entire value of the property, and in some instances more to the building of the improvements, then they pass without the spirit and purpose and authority of the constitution, and are void."

The *McBean Case* was one of extreme hardship, and was so treated by the court, inasmuch as it laid a tax of \$1,500,000 upon about nine streets in the city of Memphis for a purpose, the building of a Nicholson pavement, which was not only not a public benefit or good, but a menace to health and an outrage upon both the city and the property owner. The decision in the *McBean Case* might very readily have rested alone upon the unreasonableness and extreme hardship of the ordinance and the great apprehension arising under its harsh conditions.

The principle which underlies the pavement cases and the laws providing for working public roads is the same that underlies the doctrine of special assessments; and, if the road laws and pavement laws are constitutional,

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then special assessments for grading and improving streets are likewise constitutional.

No one now questions the validity or wisdom of the pavement or road laws; and the basis on which they rest is the same as that underlying special assessments.

The *Reelfoot Lake Case* reluctantly followed the *McBean Case*, while recognizing that the great weight of authority was against it. It adds nothing to the force of the *McBean Case*, but to the contrary.

The *McBean Case* recognizes a conflict between that case and the pavements cases; and sought to discredit the latter, but they have become the unquestioned law, and are in accord with all other authority.

That these cases cannot consistently stand together is, we think, manifest; and, when our own holdings are thus inconsistent and conflicting, they should be made to harmonize by adopting that view which is best supported by reason and authority.

Without passing upon all the provisions of the act and of the ordinances in question, but confining ourselves alone to the general question of the constitutionality of the law and ordinances and the power to make special assessments, we are of opinion that the act is constitutional, and that the ordinances are valid, in so far as they authorize special assessments for local benefits and purposes.

We think that none of the objections made to them in complainants' bill are well taken.

It follows that the cases of *Taylor*, *McBean & Com-*

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pany v. Chandler, 9 Heisk., 352, 24 Am. Rep., 308, and *Reelfoot Lake District v. Dawson*, 97 Tenn., 151, 36 S. W., 1041, 34 L. R. A., 725, and other cases holding doctrines contrary to what is herein laid down, must be overruled and modified so far as they conflict with the present holding.

The decree of the court below overruling the demurrer is reversed, the demurrer is sustained, and the bill is dismissed, at complainants' cost.

McAlister, J., dissents.

MR. JUSTICE NEIL delivered the following dissenting opinion.

I do not undervalue the painstaking and conscientious care with which the majority of the court have reached the conclusion just announced; but, finding myself unable to concur in that conclusion, and the question being an important one, I feel it my duty to assign my reasons in writing.

In my judgment the act upheld in the majority opinion is plainly void, because in violation of article 2, section 28, of our State constitution, which requires that all taxation shall be equal and uniform throughout the State, and shall be laid upon all property subject to taxation, and according to value. That special assessment laws are a form of taxation is conceded in the majority opinion in the language quoted from authorities cited in that opinion. We shall now recall a few of these, viz.:

"A special assessment, or 'local assessment' as it is frequently called, is a species of taxation imposed by

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municipalities for the purpose of local improvement," etc. *Smith, Municipal Corporations.*

"Special assessments are a peculiar species of taxation, standing apart from the general burdens imposed for State and municipal purposes," etc. 2 *Cooley on Taxation* (3d Ed.), 1158.

"Special assessments for local improvements are made under the sovereign power of taxation," etc. *Judson on Taxation*, section 355.

In 25 *Am. & Eng. Ency. Law*, pp. 1168, 1169, quoted in the opinion, an effort is made to distinguish special assessments from taxes, but near the close of the excerpt the following concession is made: "Such assessments are levied in the exercise of the power of taxation, and not in the exercise of the power of eminent domain."

In the text of the majority opinion, as expressing the conclusion drawn by the majority from the authorities above referred to and other authorities, occurs the following:

"While special assessments are in the nature of taxation, still they are not taxation for general governmental purposes, in the sense provided for in the constitution. They are different in many respects. Some of these differences are pointed out in the cases. Thus exceptions which apply in cases of governmental taxes do not extend to special assessments. Special assessments do not recur annually, or at stated periods, but are imposed as occasion requires. Special assessments are lev-

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ied alone upon real estate, and not upon personal property."

But none of the foregoing differentiations relieve special assessments from the controlling features which is characteristic of all taxation; that is, that it is a monetary exaction imposed by the government upon the citizen, which, when realized, is to be expended by the government for purposes designated by it. This mark remaining, the differentiations referred to are immaterial, when we are considering the question whether special assessments are a form of taxation.

I need not, however, pursue this phase of the matter further, because it is conceded in substantially all of the authorities quoted with approval in the majority opinion that special assessments are a form of taxation.

If a form of taxation, then my proposition is that they fall under article 2, section 28, of our constitution. That section covers all forms of taxation. It makes no exception of any, and in my judgment this court is not authorized to sanction any.

The language of the constitution is:

"All property, real, personal, or mixed, shall be taxed, but the legislature may except such as may be held by the State, by counties, cities, or towns, and used exclusively for public or corporation purposes, and such as may be held and used for purposes purely religious, charitable, scientific, literary, or educational, and shall except one thousand dollars worth of personal property in the hands of each taxpayer, and the direct product of

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the soil in the hands of the producer and his immediate vendee. All property shall be taxed according to its value, that value to be ascertained in such manner as the legislature shall direct, so that taxes shall be equal and uniform throughout the state. No one species of property from which a tax may be collected shall be taxed higher than any other species of property of the same value," etc. Article 2, section 28.

"The general assembly shall have power to authorize the several counties and incorporated towns in this State to impose taxes for county and corporation purposes respectively, in such manner as shall be prescribed by law; and all property shall be taxed according to its value, upon the principles established in regard to State taxation." Article 2, section 29.

Plainly under these sections of the constitution, whenever a tax is laid, it must be laid upon all property, real and personal, within the area covered by the tax; and with equal plainness it appears that the area covered must be the whole State if it be a State tax, the whole county if it be a county tax, the whole city if it be a city tax. No other form of tax is provided for or permitted under our constitution, and that constitution has always been so construed until to-day. The whole matter was thoroughly gone over in two well considered opinions by this court, which the opinion of the majority overrules. *Taylor, McBean & Company v. Chandler*, 9 Heisk., 349, 24 Am. Rep., 308, and *Reelfoot Lake Levee District v. Dawson*, 97 Tenn., 151, 36 S. W., 1041, 34 L. R. A., 725.

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The present tax is violative of the constitution because it is laid only upon land, and not upon both land and personalty, and because it is laid upon an area less than the whole city.

In conclusion, I wish to say that I am not unmindful of the importance of the vast array of authority referred to in the opinion of the majority, and upon this phase of the inquiry can only reply that upon this court is laid the duty of construing the constitution of this State, and of preserving it from violation or injury. The decisions of other courts, upon other constitutions, more or less similar, cannot be controlling upon me. We must decide for ourselves, and, having so decided, it can be to us no just ground of disquiet that other States have construed their constitutions in a different manner. Over thirty years ago, in the 9 Heisk. case, this court, conceding that other courts had taken a different view of the form of taxation known under the name of special assessments, solemnly declared that such taxation was not admissible under our constitution. Again, nine years ago, the whole question was a second time considered in an elaborate and able opinion in the *Reelfoot Lake Levee District Case*, and the same doctrine was again solemnly announced, notwithstanding the strong current of opposing decisions in other jurisdictions. Both decisions were by unanimous courts, and have hitherto withstood all assaults made upon them. I still think that both of these decisions contain sound expositions of our constitution.

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MILLER *et al.* v. WOLFE, *Clerk.*

(*Knowville.* September Term, 1905.)

1. **INHERITANCE TAX.** Six years statute of limitation does not apply to.

Chapter 24, Acts of 1885, which bars the collection, and extinguishes the lien, of property, privileges and poll taxes after six years from the first of January of the year for which such taxes accrued, has no application to collateral inheritance taxes.

Acts cited and construed: 1885, ch. 24; 1893, ch. 174.

Case cited and approved: Zickler v. Union Bank & Trust Co., 104 Tenn. 277.

Case cited and distinguished: State v. Alston, 94 Tenn., 674.

- 2 **SAME.** Suit for, barred after five years.

Collateral inheritance taxes are barred, and presumed to have been paid, unless sued for within five years after they are due and demandable.

Act cited and construed: 1893, ch. 174.

3. **SAME.** Same. Applies to all actions for inheritance taxes.

The limitation of five years is not confined in its application to purchasers of real estate from persons liable for the tax, but constitutes a general limitation in all actions for inheritance taxes.

FROM HAWKINS.

Appeal from Circuit Court of Hawkins County.—A. J. TYLER, Judge.

Miller v. Wolfe.

J. O. PHILLIPS and S. F. POWELL, for Miller *et al.*

A. T. BOWEN, for Clerk.

MR. JUSTICE NEIL delivered the opinion of the Court.

This action was brought in the county court of Hawkins county to recover an inheritance tax, and after a final disposition was made of it there the cause was appealed to the circuit court of the county. In that court judgment was rendered against the plaintiffs in error for the amount of the tax claimed and interest, \$866, from which judgment an appeal was prayed and prosecuted to this court.

The only questions made here arise upon the statute of limitations; the action having been instituted more than six years after the claim accrued.

It is first insisted that chapter 24, p. 71, Acts 1885, applies. That statute provides that "all State, county, school, railroad, and municipal taxes, assessed on property, and all State, county, or municipal privilege taxes, and all poll taxes that hereafter fall due shall be barred, and any lien for such taxes canceled and extinguished, unless the same are collected, or suits for the collection shall have been instituted within six years from the first of January of the year for which such taxes accrued."

It is insisted that, inasmuch as the inheritance tax is a privilege tax (*State v. Alston*, 94 Tenn., 674, 681, 30 S. W., 750, 28 L. R. A., 178), it falls within the direct terms of the act. We think, however, that a conclusive answer

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to this position is to be found in the fact that our inheritance tax law (Acts 1893, p. 347, c. 174) created a peculiar system, which the legislature intended should stand apart, separate, and distinct from the current of our general tax laws. *Zickler v. Union Bank & Trust Co.*, 104 Tenn., 277, 57 S. W., 341. The inheritance tax law was not passed until long after the act of 1885, and, having been so obviously intended by the legislature to operate as a distinct system, we would not be justified in extending the provisions of the act of 1885 to it by construction. The correctness of this position is emphasized by the fact that the act of 1893 itself contains a section which provides for a limitation of actions brought for the recovery of demands arising thereunder.

It is next insisted that the limitation contained in the section last referred to bars the present action.

That section reads as follows: "Sec. 19. . . . The lien of the collateral inheritance [tax] shall continue until the tax is settled and satisfied: Provided, that the said lien shall be limited to the property chargeable therewith; and provided further, that all collateral inheritance tax [es] shall be sued for within five years after they are due and legally demandable, otherwise they shall be presumed to have been paid, and cease to be a lien as against any purchaser of real estate."

It is insisted for the State that the last clause so confines the limitation as to admit of its application only to purchases of real estate from the person liable for the tax. We are of the opinion, however, that this is too

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narrow a construction, and that the purpose of the legislature, on the contrary, was to establish a general limitation of five years in this class of cases. The language used is very broad: "All collateral inheritance taxes shall be sued for within five years after they are due and demandable, otherwise they shall be presumed to have been paid." The subsequent clause referring to the lien, which is a mere incident of the tax, could not be properly construed to cut down this broad language.

We are of opinion, therefore, that his honor the circuit judge committed error in refusing to sustain the plea interposing this special five years' limitation. The judgment must therefore be reversed, and the suit dismissed.

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STATE, *ex rel.*, *et al.* v. U. S. GRANT UNIVERSITY *et al.*

(*Knoxville*. September Term, 1905.)

1. **CORPORATIONS.** Educational corporation is dissolved by conveyance of its property and franchises to another educational corporation, for the payment of its debts, and cannot sue, when.

Where an educational corporation conveys and transfers its franchises, powers, and privileges to another educational merger corporation, and conveys all its property to an educational aid or auxiliary corporation in consideration of the payment of its debts, with the provision and agreement that the property is to be conveyed by the said auxiliary corporation to the said educational merger corporation, when it is financially able to operate and carry on the school, and upon its refunding to the auxiliary corporation the money expended in payment of said debts, and delivers the possession of the property to the said merger corporation, the conveying corporation, both under the common law and under our statutes, by its such conveyance, worked a dissolution and terminated its existence, and cannot afterwards maintain a suit, especially more than five years afterwards under our statutes. (*Post*. pp. 240-255.)

Code cited and construed: Secs. 2070, 2071, 2525 (S.); secs 1719, 1720, 1984 (M. & V.); secs. 1492, 1493 (T. & S. and 1858).

Acts cited: 1875, ch. 142.

Cases cited and approved: *State v. Bank*, 5 Bax., 108, 116, 117, 118; *Railroad v. Kyle*, 9 Lea, 691; *Pennsylvania College Cases*, 13 Wall., 190.

Cases cited, approved, and distinguished: *College v. Bartlett*, 8 Bax., 231; *Railroad v. Kyle*, 9 Lea, 691; *Bache v. Society*, 10 Lea, 437; *Parker v. Hotel Co.*, 96 Tenn., 273.

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2. SAME. Trustees cannot sue when the corporation cannot.

A mere trustee of a defunct corporation cannot maintain a bill in behalf of the corporation where it has no power or right to sue. (*Post*, pp. 255.)

3. SAME. Trustee cannot sue, unless he requests the corporation to sue, and it refuses.

A trustee of a corporation cannot sue in its behalf, unless he shows that he has requested it to sue, and that it has refused. (*Post*, pp. 255, 256.)

Cases cited and approved: *Gas Co. v. Williamson*, 9 Heis., 338, 339; *Boyd v. Sims*, 87 Tenn., 777, 778.

4. SAME. Same. Facts that excuse request of corporation to sue, and not mere conclusions, must be alleged.

A trustee of a corporation cannot maintain a bill in its behalf upon the allegation that an application to it to sue would be useless formality, which is only a conclusion of law, but the facts which excuse such a demand or request must be stated with particularity and definiteness. (*Post*, pp. 256, 257.)

Cases cited and approved: *Steiner v. Parsons*, 103 Ala., 215; *Brewer v. Theater*, 104 Mass., 378.

5. PARTIES TO SUITS. Intermediate grantee is an indispensable party to conveyor's suit to recover the property and to cancel contract, when.

The educational aid or auxiliary corporation, to which the conveyance of property was made as for the purpose stated in the first headnote is an indispensable party to a suit by the conveyor to recover the property, and to have the contract canceled. (*Post*, p. 257.)

6. CORPORATIONS. Amendment to charter of educational corporation that is not fundamental does not require unanimous consent of trustees, but majority only.

An amendment to a charter of an educational corporation for the maintenance of schools of law, medicine, theology, and technology, and an academic department, so as to authorize a col-

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lege of liberal arts, literature, and general culture, is merely auxiliary, and not fundamental, because it does not seek to change the character of the corporate business, and, therefore, the unanimous consent of the trustees of the corporation is not required, but a mere majority is sufficient. (*Post*, pp. 245, 246, 257-259.)

Cases cited and approved: *Deaderick v. Wilson*, 8 Bax., 108; *Muller v. Insurance Co.*, 92 Tenn., 167.

FROM McMINN.

Appeal from the Chancery Court of McMinn County.—T. M. M'CONNELL, Chancellor.

BURKETT, MANSFIELD & MILLER, for complainants.

W. G. M. THOMAS, C. R. EVANS, and WHITE & MARTIN, for defendants.

MR. JUSTICE M'ALISTER delivered the opinion of the Court.

The general scope of this bill is to enforce certain alleged contracts between the Grant Memorial University, situated at Athens, McMinn county, Tenn., and the U. S. Grant University, located at Chattanooga, Tenn., or, in the alternative, to have said contracts canceled, and certain educational property restored to the possession of the Grant Memorial University, and, further, to enjoin the former corporation against interfering with the com-

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plainant in the control and management of said property.

The complainants to the bill are the State of Tennessee, on relation of Fisher, Bayless, and the Grant Memorial University. Fisher sues in the capacity of a trustee of Grant Memorial University; Bayless sues as a trustee of the defendant the U. S. Grant University and the Grant Memorial University sues in its own right.

The defendants are the U. S. Grant University, J. H. Race, its president and trustee, and seventeen individuals who are charged to be among the alleged trustees of the complainant Grant Memorial University.

A demurrer was interposed on behalf of all the defendants in the court below; some of its specifications being sustained, and others overruled, by the chancellor. On appeal to this court the cause was assigned to the court of chancery appeals, which tribunal sustained all the assignments of the demurrer and dismissed the bill. Complainants appealed to this court and have assigned errors.

It appears from the allegations of the bill that in the year 1867 a college was located at Athens, McMinn county, Tenn., and placed under the control of the Holston Annual Conference of the Methodist Episcopal Church. This institution was given power by its charter to purchase, acquire, and hold property for educational purposes at or near Athens. The original act of incorporation provided that the charter members should be trustees, and vacancies therein occurring from time to time

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should be filled by the Holston Annual Conference of the Methodist Church. The bill further charged that said trustees acquired property at a cost of \$7,200, which sum was raised by donations, for the purpose of establishing a university for higher educational purposes. In 1868 the corporate name of the institution was changed to the East Tennessee Wesleyan University. In 1886 its name was again changed to the Grant Memorial University, and under this name it was conducted up to 1892. It further appears from the bill that in 1886 another college was established at Chattanooga under the patronage of the Methodist Church, which was known and designated as Chattanooga University, and from 1886 to 1889 this university conducted departments at Chattanooga. Another corporation figures in this litigation which was known as the Freedman's Aid & Southern Educational Society, which was also an auxiliary of the Methodist Church. It was incorporated about the close of the civil war, and its object was to extend financial aid to schools connected with the Methodist Church. It was soon discovered that the operation of the two universities under the auspices of the same church in such close proximity to each other would, because of their rivalry, tend to impair the usefulness and prosperity of both institutions, and the idea was conceived of founding a central university, to be composed of the two colleges, and which would operate both under a division of departments at the two places. The college of liberal arts, the departments of law and medicine, under the plan of unifica-

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tion, was to be located at Chattanooga, while the school of theology and the school of technology were to be at Athens, with academic departments of each grade at each place. It is then charged that, to carry out this plan, in 1889 the U. S. Grant University was incorporated under the act of 1875, and was located at Chattanooga, Tenn. In 1889-90, the Chattanooga University already mentioned conveyed all its property and franchises to the new U. S. Grant University. In 1892 the complainant corporation, namely, the Grant Memorial University, conveyed its properties, etc., to the Freedman's Aid & Southern Educational Society, upon its assumption of the payment of the debts of the former, which was afterwards done. It is stated in the bill that this conveyance was made to the Freedman's Aid Society, with the understanding that this property was to be conveyed to the new U. S. Grant University when the latter corporation became financially able to carry on both schools. It further appears from the bill that in 1892, at the time the Athens University conveyed its property to the Freedman's Aid Society, it also transferred its franchises, powers, and privileges to the new U. S. Grant University. It further appears that the last election of trustees from the Athens University by the Holston Annual Conference occurred in 1892, and in that year, by the unanimous consent of these trustees, the franchises and entire property of the Athens University were conveyed as already stated. It further appears that since 1892 there has been no meeting of the trustees of the

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Grant Memorial University, and no attempt on their part to interfere with the operations of the new U. S. Grant University. It should be further stated that on June 7, 1892, the charter of the U. S. Grant University was amended in the following language: "For the purpose of vesting said corporation with the power as follows: The school of theology, the school of law the school of medicine and the school of technology shall be located at Chattanooga, Tenn., with academic departments of equal grade at each place, and such other departments of equal grade at each place, and such other departments as may hereafter be determined by the board of trustees."

The bill then charges:

"This amendment was made June 7, 1893, and, as a result thereof, the right to a college of the liberal arts at Chattanooga was surrendered, and it was contemplated that a school of theology, law, medicine, and technology should be established at Chattanooga, and that the university at Athens as originally organized, contemplated, and maintained should be left intact. When this action was taken, the school of theology was transferred to Chattanooga and the school of liberal arts at Chattanooga was abandoned, the right to maintain a school of technology at Athens was surrendered, and the right to establish a school of technology at Chattanooga was constituted. Complainants charge that, as a result of the long agitation and controversy, it was finally directed, agreed upon, and determined that the defendant cor-

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poration should have the right to operate the two schools at Athens and Chattanooga as a consolidated university, and on condition only of the division of the departments just mentioned, to wit, the professional schools and the school of technology at Chattanooga, and the university with its adjuncts at Athens. With this full and final understanding and with this solemn contract, complainant corporation permitted the defendant corporation to take charge of, and possession of its property at Athens, and of which it had possession and control, for the purpose of maintaining a university along the lines of consolidation agreed upon as aforesaid, and with the full belief that said settlement was entered into in good faith and would likewise be carried out, and for that reason, and there being no question for further corporate action, the trustees of the complainant corporation have, since this action was taken, had no meetings, and have permitted the defendant corporation to operate the university at Athens."

It will be observed that these allegations of the bill are entirely destitute of any designation of the contracting parties, nor is it stated therein when and where the alleged contract was made, nor its terms set out with any degree of definiteness.

However, in 1903, the charter of the U. S. Grant University was again amended, and the power was conferred "to establish and maintain, in connection with the colleges of law, medicine and theology, a college of liberal arts, literature and general culture, with the power to

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confer degrees in Chattanooga." This amendment is attacked by the bill, and for the reason that it was not applied for unanimously by the twenty-one trustees. Eight of the twenty-one trustees did not sign the application, and this attack raises the question whether such charter amendment must be made by the unanimous consent of all the trustees, and whether all must sign the application. This is a sufficient statement of the case to indicate the relevancy of the demurrer interposed to the bill.

Complainants are confronted at the threshold of this investigation with serious obstacles in the pathway of each and all of them in maintaining this bill. The Grant Memorial University cannot maintain this bill, since it was one of the constituent corporations that became merged in the consolidated corporation, the U. S. Grant University.

The record discloses that in 1892 the Grant Memorial University, by the unanimous consent of its board of trustees, conveyed all of its property to the Freedman's Aid and Southern Educational Society, in consideration of the assumption and payment by the latter of the corporate debts of the former. These debts were accordingly paid off and discharged by the Freedman's Association. Contemporaneously with the last conveyance, the Grant Memorial University, by the unanimous consent of its trustees, surrendered all of its franchises, good will, etc., to the consolidated corporation. The new corporation into which the constituents corporations had become merged, accepted the transfers, and, since 1892

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up to the filing of this bill in 1904, a period of twelve years, has conducted the educational affairs of the old corporation without complaint or legal interference from either of them.

We think, upon the facts stated, the Grant Memorial University is not entitled to maintain the bill, and the principles stated in the *Pennsylvania College Cases*, reported in 13 Wall., 190, 20 L. Ed., 550, are controlling.

We quote from a digest of that case from Hirschel on Combinations, Consolidation, and Succession of Corporations as follows:

“Jefferson College, chartered under the laws of Pennsylvania, was subject to having its charter altered by the legislature. Thereafter, in 1865, by consent of its own trustees and the trustees of Washington College, the two were consolidated, their funds united into one, and the new college made liable for all the liabilities and scholarships of each of the old; but certain parts of the course were still pursued at Jefferson and the rest at Washington. Then, in 1869, by another act of legislature, the several departments were closely united, and the trustees authorized to locate them all at one or the other colleges, and to give an academy or some other institution to the town from which the college was removed. Accordingly, the entire college was established at Washington. The removal was sought to be prevented by the trustees of Jefferson College, to which respondents pleaded that the complainants, as trustees, had accepted the acts of the legislature, and hence their corporation became dis-

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solved by the creation of the new corporation. The court finds that the legislature had the right to change the charter, for the right to do so was reserved, and finds also that such right, even if not reserved, can be exercised with consent of the corporations affected thereby, and that such consent existed; finds also that by the creation of the new, the old colleges were still to exist as institutions of learning, and that by the act of legislature the two original corporations became merged in one corporation created by said acts, and that neither of the original corporations is competent to sue for any cause of action subsequent in date to their acceptance of the new act of incorporation.

“The case of the dissenting trustees of the new corporation is disposed of on the same grounds, and the case of the scholarship holders of the Jefferson College, who complained that by its removal they were subjected to greater inconvenience in making available their scholarships, is disposed of on the same ground, viz., that the right to change the charter was reserved to the legislature, and moreover was consented to by the corporation, in which case the scholarship holders cannot complain, as they have no contract with the State, and hence they cannot complain that the State had passed any law impairing a contract. Their contract was with the trustees and not with the State, and was subject to the State’s reserved right to alter the charter of the college. The existence of a contract between the college and the scholarship holders can certainly not have the effect of inhibit-

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ing the legislature from altering, modifying or amending the charter of the corporation by virtue of a right reserved to that effect, or with the assent of the corporation, if, in view of all the circumstances, the legislature should see fit to exercise that power." Hirschel, 215; *Pennsylvania College Cases*, 13 Wall., 190, 20 L. Ed., 550.

The language of the court was, viz.:

"Authorized as the act of the legislature was by the reservation contained in the original charter, and sanctioned as the act was by having been adopted by the corporators, it is clear to demonstrate that the act uniting the two colleges was a valid act, and the two original corporations became merged in the one corporation created by the amendatory and enabling act passed for that purpose, and that neither of the original corporations is competent to sue for any cause of action subsequent in date to their acceptance of the new act of incorporation."

It is insisted by learned counsel for appellant that this case is to be distinguished from the *Pennsylvania College Cases* in these important particulars:

(1) There has been no act on the part of the State and no merging of the corporations. It is insisted that the complainant corporation has preserved its existence and its entity, and is simply endeavoring to set aside the illegal and voluntary amendment to defendant's corporation charter, or, in default thereof, to enforce the contract under which it obtained possession of complain-

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ant's property. It is suggested the bill does not show that complainant corporation had parted with its franchises, and does not show that it had parted with its property, but simply shows a nonuser for a term of years because the property was being operated in compliance with the contract hereinbefore set out. It is insisted that the demurrer and the opinion of the court of chancery appeals ignored the charge in the bill that complainant corporation was the equitable owner of its real estate, and that it simply turned it over to defendant corporation to be operated under a specific contract.

Counsel cite *Maryville College v. Bartlett*, 8 Baxt., 231; *Bache v. Nashville Horticultural Society*, 10 Lea, 437; *Rogersville, etc., R. R. v. W. C. Kyle*, 9 Lea, 691; *Parker v. Bethel Hotel Co.*, 96 Tenn., 273, 34 S. W., 209, 31 L. R. A., 706; Shannon's Code, section 2070.

But these cases are not applicable here, for the reason that in neither of them did it appear that the corporation had conveyed the legal title and all equitable interest in its property, together with all its corporate franchises, power, good will, etc. An examination of the cases cited will show that they are to be differentiated from the present case in these particulars. We are of opinion, however, that the ruling of the supreme court of the United States in the *Pennsylvania College Cases* is applicable in the present instance. In the first place, we understand the bill to charge that there had been a union or merger of the Grant Memorial University and the Chattanooga University into a corporation created un-

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der the act of 1875 and known as the U. S. Grant University. It is conceded in the bill that this action was taken by and with the consent of the trustees of both the old corporations, and there was an acceptance of this union by the U. S. Grant University. It appears that this consolidation of the two old corporations into the U. S. Grant University occurred in 1892, and since that date neither of the old corporations has elected a board of trustees or exercised any other corporate function. We understand it to be conceded by the bill that in 1892 the Grant Memorial University transferred its real estate to the Freedman's Aid and Southern Educational Society, and that at the same time it transferred its franchises, etc., to the U. S. Grant University with the understanding that when the latter university was financially able to operate and carry on the school at Athens and Chattanooga, then the Freedman's Aid and Southern Educational Society was to transfer the real estate, not to the Grant Memorial University, but to the new U. S. Grant University, which should refund to the Freedman's Aid and Southern Educational Society the money the latter society had expended in paying off the debts of the old Grant Memorial University. It thus appears from the allegations of the bill that the old Grant Memorial University conveyed the legal title of all its real estate to the Freedman's Aid and Southern Educational Society, and all equitable interest which it had in said property, together with all its corporate franchises, power, etc., to the U. S. Grant University.

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It is claimed in the bill, however, that the general assembly did not reserve the right to amend the charter of the East Tennessee Wesleyan University, which was succeeded by the Grant Memorial University, and that there was no general act in force in 1892, which authorized the Grant Memorial University to transfer its property to the Freedman's Aid and Southern Educational Society, and its franchises, etc., to the U. S. Grant University. But the draftsman of the bill was clearly in error in both of these assumptions, which will appear upon an examination of the charters and constituent acts of assembly in force at the time of the transfer in 1892. It appears that the East Tennessee Wesleyan University, the predecessor of the Grant Memorial University, was incorporated by private charter prior to the general incorporation act of 1875, but that said corporation thereafter accepted the benefits of the act of 1875 by an amendment of the original charter. It further appears that the Chattanooga University was incorporated under the act of 1875, as was also the U. S. Grant University. This latter act also reserved the power to change and amend the charter.

This new corporation accepted the trust and has since been managing and controlling both of the old schools. All this was done by and with the consent of both of the old schools. We think the principle is well established that a corporation has a right to surrender its property and franchises and when it is done with the consent of the State the identity and corporate entity of the former

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is lost. The parties now complaining are the surrendering corporation and one of its trustees, together with a trustee of the consolidated corporation, and it is very obvious that all of these parties are bound by the terms of the amalgamation.

Complainants claim in their brief that, when the Grant Memorial University deeded its property to the Freedman's Aid and Southern Educational Society, the property was merely conveyed to said society to hold as trustee until the Grant Memorial University was financially able to resume the operation of the college at Athens.

It suffices to say in respect of this contention, that it has no anchorage in the allegations of the original bill. On, the contrary, it is distinctly stated in the original bill that in 1892 the Grant Memorial University transferred its real estate to the Freedman's Aid and Southern Educational Society, and that at the same time transferred its franchises, etc., to the U. S. Grant University, with the understanding that when the latter corporation was financially able to carry on both schools, then the Freedman's Aid Society was to transfer the real estate, not to the old Grant Memorial University, but to the new U. S. Grant University, which latter corporation was to refund to the Freedman's Aid Society the money with the latter society had expended in paying off the debts of the old Grant Memorial University.

In addition to common-law principles, there are also statutory reasons why complainant Grant Memorial University cannot maintain this bill.

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It is provided by section 2525 of the Code, in dealing with corporations created for the general welfare and not for profit, as follows:

"The members may, at any time, voluntarily dissolve the corporation by a conveyance of its assets and property to any other corporation holding a charter from the State, for the purpose not of individual profit, first providing for corporate debts."

This is precisely what was done in 1892 by the unanimous action of the trustees of the Grant Memorial University. It conveyed the entire assets and corporate property to the Freedman's Aid and Southern Educational Society, admittedly an educational institution, and at the same time it abdicated its functions as a separate educational institution, and conveyed to the consolidated corporation its entire franchises, etc. As evidence that both of the old corporations regarded themselves as dissolved no corporate meetings of either have, since that time, been held, nor have their boards transacted any business. Moreover, the annual conference of the Methodist Episcopal Church, under whose patronage these corporations were both organized and maintained, had elected no trustees for either of the old and extinct corporations since 1892.

Again, section 2070 of Shannon's Code provides:

"Whenever powers, franchises and privileges have so been granted to a corporation and they are not used, or are assigned to others in whole or in part, such corporations shall not be dissolved unless all the corporate prop-

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erty has been appropriated to the payment of its debts."

As already stated, the power, franchises, and privileges of the Grant Memorial University have not been used since 1892, and have been assigned to others, after having made provision for the payment of its corporate debts.

By section 2071 of the Code it is provided that:

"Any such corporation dissolved for any cause shall exist as a body corporate for the term of five years after such dissolution, for the purpose of prosecuting or defending suits by or against it, and settling its business."

In the case of *Railroad v. Kyle*, 9 Lea, 691, this court held that "the sale of realty at the suit of the State to enforce its statutory lien dissolved the corporation, and that a suit brought by the corporation more than five years after dissolution could not be maintained." *State v. Bank*, 5 Baxt., 108, 116, 117, 118.

So that, for all these reasons, we are clearly of opinion that this bill cannot be maintained by the Grant Memorial University, a defunct corporation. A mere trustee of the corporation would possess no higher right, and hence, R. J. Fisher, trustee of Grant Memorial University, has likewise no status for the prosecution of such a suit. Moreover, it does not appear that complainant Fisher has made any demand upon any one of these corporations to prosecute such a suit. It is well settled that a trustee of one corporation cannot sue another corporation, unless he shows that he has asked his own corporation to sue for the alleged injury done to it by the

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other, and that it has refused. *Boyd v. Sims*, 87 Tenn., 777, 778, 11 S. W., 948; *Gas Co. v. Williamson*, 9 Heisk., 338, 339.

The only remaining complainant is J. W. Bayless, who sues as trustee of the U. S. Grant University, who has made no application to his corporation or its trustees or officers to bring suit. He excuses his failure to make such demand for the following reasons:

"He [Bayless] charges that an application to the defendant corporation for such redress has not been made by him since the last meeting of the board of trustees of defendant university, and it would be a vain and useless formality and waste of both paper and ink to make any application to them whatever, as a majority of the board of directors of said college are dead set on establishing a school of the liberal arts at Chattanooga, and to the extent of injuring and breaking down the university at Athens, and no appeal to them outside of a decree of the court would be effectual whatever."

But it will be observed that no facts are stated showing that his associates in said board have done any act or used any language showing that an appeal to them would be an idle ceremony, but the dissenting director or trustee contents himself with the statement of a mere opinion on his part. The rule on this subject is thus stated by Mr. Cook, in his work on Corporations (volume 2 [4th Ed.], 741): "When the corporation management is under control of directors who are acting in a different manner concerning corporate affairs from that in

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which the complainant directors think they should act, no request need be made or alleged, since the guilty parties would not comply with the request, and even if they did the court would not allow them to conduct the suit against themselves. Nevertheless, instead of this allegation, the complainant must allege the facts which excuse such a demand or request to the directors, and these facts must be stated with particularity and definiteness." In *Steiner v. Parsons*, 103 Ala., 215, 13 South., 771, it was stated on this subject that: "The allegations of these facts must be statements of fact and not conclusions of law. The manner in which the directors are interested must be pointed out." See, also, *Brewer v. Boston Theater*, 104 Mass., 378.

Again, we think the Freedman's Aid and Southern Educational Society is an indispensable party defendant to this proceeding. As already stated, it is admitted in the bill that in 1892, the Athens corporation did surrender its property to the Freedman's Aid and Southern Educational Society, and conveyed to it the legal title. We are unable to perceive how complainant can have this property restored and the contract for the surrender of its power, franchises, and privileges to the consolidated corporation canceled, and the original *status quo* restored, without the joinder of such a party defendant.

The ninth assignment of error is based upon the action of the court of chancery appeals in sustaining the ninth ground of demurrer, to that portion of the bill which attacks the validity of the amendment to the charter of

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the U. S. Grant University made on the —— day of ——, 1903. This amendment authorized the new university to “establish and maintain, in connection with the colleges of law, medicine, and theology, a college of liberal arts, literature and general culture, with power to confer degrees, in Chattanooga.”

The bill attacks the validity of this charter amendment upon the ground that it should have been applied for by all the twenty-one trustees, whereas eight of that number did not join in the application. The demurrer proceeds upon the idea that the amendment is given without the unanimous application of the trustees.

The argument advanced on behalf of the appellant in opposition to the action of the court of chancery appeals is that, at the date of the unification of the two corporations, an amendment to the charter had been adopted, which provided that the school of liberal arts should be located at Athens and the other school at Chattanooga. It is insisted this constituted a contract between the corporation and its incorporators, and between the corporation and its trustees. It is then said that the new corporation in 1903 attempted to violate its charter and the contracts made in consideration thereof, and by the action of thirteen out of twenty-one directors attempted to amend its charter so as to vest the defendant corporation with power to establish a school of liberal arts at Chattanooga.

We are of opinion, however, that the amendment was merely auxiliary and not fundamental since it did not

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seek to change the character of the corporate business, but merely to establish a department of liberal arts in Chattanooga. This court held in the case of *Miller v. Ins. Co.*, 92 Tenn., 167, 21 S. W., 39, 20 L. R. A., 765, that an amendment which does not change the character of the business, and simply authorizes its reasonable extension upon the lines of the original project, is not fundamental, and does not require unanimous consent. A mere majority is sufficient. See, also, *Deaderick v. Wilson*, 8 Baxt., 108.

In conclusion it will be stated that, while we did not set out the specifications of the demurrer, it suffices to state that all the questions herein discussed were properly raised thereon, and for the reasons stated the decree of the court of chancery appeals will be affirmed.

Brogan v. Barnard.

BROGAN et al. v. BARNARD et al.

(*Knoxville*. September Term, 1905.)

1. **HOLOGRAPHIC WILLS.** Statutory provisions relating to, must be complied with.

The several requirements of the statute relating to holographic wills are equally important and must be fully complied with in order to establish such a will.

Code cited and construed: 3896 (S.); 3004 (M. & V.); 2163 (1858).

2. **SAME.** Same. Meaning of the term "valuable papers" in statute relating to holographic wills. Case in judgment.

The words, "valuable papers," in the statute providing that a writing appearing to be the will of a decedent, written by him and found after his death "among his valuable papers," mean documentary papers deemed valuable and worthy of preservation by the owner; and a paper writing of a decedent found in a box where he kept stamps and stationery for sale and use as postmaster, was not found among such "valuable papers" as are essential to sustain such writing as a holographic will.

Code cited and construed: 3896 (S.); 3004 (M. & V.); 2163 (1858).

Case cited and approved: *Marr v. Marr*, 2 Head, 306.

FROM CLAIBORNE.

Appeal in error from the Circuit Court of Claiborne County.—A. J. TYLER, Judge.

Brogan v. Barnard.

HUGHES & HUGHES, for Brogan *et al.*

G. W. MONTGOMERY and JESSE L. RODGERS, for Barnard *et al.*

MR. JUSTICE SHIELDS delivered the opinion of the Court.

This is a contested will case. The paper writing propounded for probate is alleged to be the holographic will of James H. Fugate, deceased. The decedent was a small merchant and country postmaster, and kept his office in his store. The paper in question was found after his death in a box in which he kept postage stamps and stationery belonging to the post office, there being at the time therein \$65 in stamps and a package of blanks for receipts for registered letters, which, while in his possession were the property of the federal government. There were no other papers in or near the box. He had valuable papers consisting of deeds and notes, but they were kept and found in a locked trunk in his residence, some fifty yards distant from the store. There was verdict and judgment in favor of the will, and the defendants prosecute an appeal in the nature of a writ of error to this court.

The sole question here presented is whether the postage stamps and blanks for receipts, with which the paper alleged to be the will of James Fugate was found, are valuable papers within the meaning of our statute

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providing for the execution and probate of holographic wills.

The statute (Code 1858, section 2163; Shannon's Code, section 3896) is in these words:

"But a paper writing, appearing to be the will of a deceased person, written by him, having his name subscribed to it, or inserted in some part of it, and found, after his death, among his valuable papers, or lodged in the hands of another for safe-keeping, shall be good and sufficient to give and convey lands, if the handwriting is generally known by his acquaintances, and it is proved by at least three credible witnesses that they verily believe the writing, and every part of it, to be in his hand."

The requirements of this statute are all equally important and necessary to be proven to sustain a holographic will. It is conceded in this case that all of them are proven save the finding of the paper writing among the valuable papers of the decedent after his death. This is denied. It is necessary to determine in the first place what are valuable papers within the sense of this statute. The case of *Marr v. Marr*, 2 Head, 306, is perhaps the leading case upon this subject. It is there said:

"What is meant by valuable papers? No better definition, perhaps, can be given, than that they consist of such as are regarded by the testator as worthy of preservation, and, therefore, in his estimation, of some value. It is not confined to deeds for land or slaves, obligations for money, or certificates of stock. Any others which are kept and considered worthy of being taken care of by

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the particular person, must be regarded as embraced in that description. This requirement is only intended as an indication on the part of the writer, that it is his intention to preserve and perpetuate the paper in question as a disposition of his property; that he regards it as valuable."

Mr. Pritchard, in his valuable work on Wills and Administration, says:

"Valuable papers, within the meaning of the statute, are such papers as are kept and considered worthy of being taken care of by the particular person having regard to his condition, business, and habits of preserving papers. They do not necessarily mean the most valuable papers of the decedent even, and are not confined to papers having a money value, or to deeds for lands, obligations for the payment of money, or certificates of stock. The requirement is only intended as an indication on the part of the writer that it is his intention to preserve and perpetuate the paper as a disposition of his property, and that he regards it as valuable; consequently the sufficiency of the place of deposit to meet the requirement of the statute will depend largely upon the condition and arrangement of the testator."

This is a clear and correct composite statement of all the decisions of this court construing and defining the provision of the statute under consideration, but it does not cover the exact question here presented. It has not heretofore been passed upon by this court. The contention of the plaintiffs in error is that the valuable papers

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contemplated by the legislature are documentary papers, papers having contents on account of which they are deemed valuable and worthy of preservation by the owner, as records, belonging to the alleged testator; and that the stamps and blank receipts with which this will was found, while papers are mere articles of merchandise belonging to the United States, kept by the decedent for sale and use alone in the discharge of his duties as postmaster.

We think this contention is sound. It is evident that the legislature, in providing that the will must be shown to have been found after the death of the decedent among his valuable papers, or lodged in the hands of another for safe-keeping, referred to papers which the decedent considered valuable and worthy of preservation as records of the facts purported to be stated and perpetuated in them, and in which he had an interest of some nature. A will is this character of a paper. It is only valuable and worthy of preservation on account of its contents. The postage stamps and blanks with which the paper in question was found, were in the possession of the decedent, but they were not his property nor valuable as records of their contents. They were the property of the United States, in his hands as agent, for sale and use when they were called for by the patrons of the office or required in the discharge of his duties.

It is not sufficient that a will be found deposited among the valuable effects of the decedent. In the original statute of North Carolina (Acts 1784, c. 10, section 5), from

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which the section of the Code providing for holographic wills was taken, it was sufficient if the alleged will was found amongst the valuable papers or "effects" of the deceased. But in codifying this statute the word, "effects," was omitted, and this requirement narrowed to "valuable papers." This modification of the original statute strongly supports the construction and interpretation we have here given of the phrase, "valuable papers."

It is also evident that the decedent did not consider the stamps and receipts his valuable papers or the box where he kept them a place for deposit of such papers, since he kept his deeds, notes, etc., in a locked trunk in his residence some distance from his store. This is a most pertinent fact tending to show the intention of the deceased in relation to the paper now offered as his will.

The assignments of error of the plaintiff in error are sustained, the judgment reversed, and the case remanded for a new trial.

State, ex rel., v. Woolen Mills Co.

STATE, *ex rel.*, v. CHILHOWEE WOOLEN MILLS COMPANY
et al.

(*Knorrville*. September Term, 1905.)

1. CORPORATIONS. Surrender of charter and dissolution of corporation by a majority of the stockholders, when.

A majority of the stockholders in a private business corporation may voluntarily surrender the charter, and abandon, discontinue, and dissolve the corporation upon terms of equality to all stockholders over the protest of the minority stockholders before the corporation had purchased any property, incurred any debts, or accomplished anything more than a temporary organization, and where it appears that the stockholders would not be materially prejudiced or financially injured by the dissolution and discontinuance, except as to prospective and speculative profits; and the dissolution will be decreed by the court in a proper suit for that purpose in order to avoid future complications and possible liabilities.

Code cited and construed: Secs. 5165, 5181 (S.); secs. 4146, 4162 (M. & V.); secs. 3409, 3425 (T. & S. and 1858).

Cases cited and approved: *Parker v. Hotel Co.*, 96 Tenn., 252; *Treadwell v. Manufacturing Co.*, 7 Gray, 393; *Hancock v. Holbrook* (C. C.), 9 Fed., 353; *Trisconi v. Winship*, 43 La. Ann., 45; *Slee v. Bloom*, 19 Johns., 456; *Hitch v. Hawley*, 132 N. Y., 221.

2. SAME. Same. Surrender of charter and dissolution is not rendered void as a combination because induced by a competing corporation, when.

The action of a majority of the stockholders in surrendering the corporation's charter as appears in the first headnote is not prohibited and rendered void by the statute (Acts 1903, ch. 140) declaring unlawful and void all arrangements, agreements,

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trusts, or combinations to lessen full and free competition in the manufacture or sale of articles of domestic raw material, where there was no arrangement between the two corporations, but the old corporation proposed to increase its capital stock, enlarge its plant, and allow all the stockholders in the new corporation to take the new stock upon certain terms of equality, all of which was done for the purpose of preventing the new corporation from going into active business. (*Post*, p. 277.)

Acts cited and construed: 1903, ch. 140.

3. **SAME.** Same. Voting stock by proxy is questionable, but action is ratified by stockholders joining in suit asking for the same action by the court.

The practice and custom of voting shares of stock by proxy is almost universal, unless it is in some way expressly prohibited, but whether the law authorizes such proxy voting or not, where a majority of the stockholders have ratified the action so taken with the aid of proxy votes by joining in the suit and making the request for a dissolution of the corporation as voted for by the stockholders and their proxies representing a majority of the stock, the point raised is a merely technical one, and will not be available. (*Post*, pp. 277, 278.)

FROM McMINN.

Appeal from the Chancery Court of McMinn County.—
T. M. M'CONNELL, Chancellor.

BURKETT, MANSFIELD & MILLER, for complainants.

PRITCHARD & SIZER, ALLEN & IVINS, and E. B. MADISON, for defendants.

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MR. JUSTICE WILKES delivered the opinion of the Court.

This is a bill in the name of the State, on the relation of the majority of the stockholders in the Chilhowee Woolen Mills Company, against the corporation and the minority of its stockholders, to have the court adjudicate and decree that the corporation has surrendered and forfeited its charter rights, and that it be dissolved. The corporation is a domestic one; the amount of stock subscribed for being \$48,600, or 486 shares. Of these complainants own 272 and the defendants 184 shares.

Defendants resist the right of complainants to enforce the surrender of the charter and a dissolution of the corporation.

The chancellor held that complainants were not entitled to the relief sought, and dismissed their bill, the court of chancery appeals reversed the decree of the chancellor and declared the corporation dissolved and its charter rights surrendered, and defendants have appealed to this court.

The material facts found by the court of chancery appeals are: That the corporation was chartered and organized in April, 1904, under the general incorporation acts of the state of Tennessee, to engage in the business of manufacturing woolen, cotton, and mixed fabrics. The capital stock was fixed at \$50,000, but *bona fide* subscriptions were obtained to only the amount of \$48,600. The stockholders held a meeting, organized, and elected a board of seven directors, to serve for a term of twelve

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months, and the directors were instructed to proceed as expeditiously as possible to carry on the business for which the corporation was chartered. The election of permanent directors was delayed until the stockholders should adopt a code of by-laws. Steps were taken to procure real estate for a site and suitable machinery, and a call of ten per cent. upon the stock was made. Such was the status of the new corporation on April 1, 1904.

It appears that previous to this time there was a corporation known as the Athens Woolen Mills, which had had a very prosperous history, and declared large dividends and accumulated quite a surplus. The managers of this corporation made overtures to the principal promoters in the new enterprise, the object of which was to prevent the new corporation from going into active business. The scheme was to increase the capital stock of the old corporation, enlarge its plant, and let in the members of the new corporation upon certain terms.

The court of chancery appeals reports that this proposition was to be open to all the stockholders of the new corporation, with no special privileges to any of them, so far as the taking of stock was concerned, and that it was submitted to the stockholders of the new concern, and a majority of them were willing and anxious to accept it, but a minority were not. The stockholders in the new concern thereupon became divided, and considerable bad feeling was engendered. Whereupon by a majority vote the stockholders of the new corporation passed a res-

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olution that the new corporation be abandoned and dissolved, to which action the minority protested.

The board of directors passed a similar resolution to dissolve the corporation, to set aside subscriptions to its capital stock, and to annul the call that had been made for any payment to the subscription to the stock, and this was also passed by a majority vote, and over the protest of the minority.

That court reports that it was evidently the purpose of the people who owned and controlled the Athens Woolen Mills to stop further proceedings of the new enterprise, and specially to secure and retain the services of Messrs. Blizzard and Mahary, to whom was due in a very large extent the success of the old company, with that company. These gentlemen did decide to go with the old company and abandon the enterprise.

So far as the motives of the two factions are concerned, the court of chancery appeals report that each was actuated by what it considered to be its best interest pecuniarily, that the old concern was a very profitable one, and that the prospect of the new was very good, and that the chief object of the Athens Woolen Mill Company, in its opposition to the new enterprise, was that it might retain the services of Messrs. Blizzard and Mahary.

Both parties seemed to have viewed the matter from their pecuniary interests.

Our statutes provide for the dissolution of a corporation by the following, among other provisions (Shannon's Code, section 5165), is in this language:

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"An action lies under the provisions of this chapter in the name of the State against a person or corporation offending in the following cases: . . . (4) or, if being incorporated, they do or omit acts which amount to a surrender or forfeiture of their rights and privileges of a corporation; (5) or exercise powers not conferred by law; (6) or fail to exercise powers conferred by law and essential to corporate existence."

Section 5181 provides:

"That if it be adjudged that a defendant corporation has by neglect, nonuser, abuse or surrender forfeited its corporate rights, judgment will be rendered that the defendant be altogether excluded from such rights and be dissolved."

These sections appear to refer more particularly to involuntary proceedings against a corporation arising out of some abuse, neglect or dereliction of duty, but they are broad enough to embrace also cases of voluntary surrender of a charter by the stockholders, and this was so held in the case of *Parker v. Hotel Company*, 96 Tenn., 252, 34 S. W., 209, 31 L. R. A., 706.

In this case we have a deliberate and formal surrender of the charter under a resolution passed by a majority of the stockholders, a similar resolution passed by a majority of the directors, all ratified and affirmed in the bringing of this bill.

If the application in this case was made on behalf of all the stockholders to have the charter surrendered and the corporation dissolved, we think that there can be no

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doubt that the relief would be granted, and the question remains whether it should be done by a majority of the stockholders, over the wish of the minority, where no business has been done by the corporation and no debts or obligations have been incurred and no liabilities have accrued.

It would seem to be an anomaly that the minority of the stockholders, under such circumstances and under such a status of affairs, could compel the majority to go forward with the organization and operation of the corporation, when the majority were opposed to such action, and could, if they saw proper, block and prevent the success of the enterprise.

This, of course, relates alone to private corporations, and not to public or quasi public corporations, nor to charitable or eleemosynary corporations, in which the public has an interest.

The court, we think, could not under such circumstances take charge of the corporation and manage it through a receiver or otherwise, nor can it grant the power to the minority to control the majority.

We do not mean to hold that a majority of the stockholders can, in bad faith, put an end to the existence of a corporation, and dissolve it, to the prejudice of the property rights of the minority.

We think there can be no doubt that the majority of the stockholders have the right to control the corporation, provided they act in good faith; that is, without

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any attempt to take advantage of the minority for the benefit of the majority.

The true rule, as we understand it, is laid down in Cook on Corporations, sections 629 and 670.

In section 629 it is said :

“It is an unquestioned rule that stockholders by unanimous consent may effect a dissolution of a corporation by a surrender of the corporate franchise. Greater difficulty is found in determining whether a majority of the stockholders may dissolve the corporation. It has been held that the majority in interest in a corporation may dissolve it by a voluntary surrender of its franchises, even though a minority of the stockholders are opposed to its dissolution”—citing *Treadwell v. Salisbury Manufacturing Company*, 7 Gray, 393, 66 Am. Dec., 490, *Hancock v. Holbrook* (C. C.), 9 Fed., 353, and other cases.

He states, however, a number of instances in which this can not be done, but he states the general principle to be that a majority of the stockholders may, where it can be done without bad faith to the minority, seek and obtain a dissolution of the corporation.

In all his excepted cases we find, however, some element of bad faith or want of good faith, or the fact of an established business or existing liabilities, where the dissolution would be practically a fraud upon the dissenting minority stockholders.

The doctrine which we approve has been virtually announced by this court heretofore in the case of *Parker v.*

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Bethel Hotel Company, 96 Tenn., 252, 34 S. W., 209, 31 L. R. A., 706, where it is said by Special Judge Bradford: "An ordinary business corporation, where its charter specifies no definite time for its continuance, may sell its property and wind up its affairs whenever a majority of the stockholders may deem it advisable"—citing cases.

In the case of *Treadwell v. Salisbury Manufacturing Company*, supra, the supreme court of Massachusetts says: "We entertain no doubt of the right of a corporation, established solely for trading and manufacturing purposes, by a vote of a majority of its stockholders, to wind up its affairs and close its business, if, in the exercise of sound discretion, they deem it expedient so to do."

At common law, the right of corporations, acting by a majority of their stockholders to sell their property is absolute and it is not limited as to object, circumstances or quantity. He proceeds to state that there are many exceptions to the rule, as in cases of quasi public corporations and charitable and religious corporations, in which the community has some interest.

To the same effect, see *Trisconi v. Winship*, 43 La. Ann., 45, 9 South., 29, 26 Am. St. Rep., 175, and *Slee v. Bloom*, 19 Johns., 456, 10 Am. Dec., 273.

Thompson on Corporations, vol. 5, section 6686, says, after commenting on public and quasi public corporations and corporations of an ideal kind, that "the same reasons do not apply in case of a corporation of a purely private nature, as in its business the state has no special

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interest. It is accordingly held that corporations of a private nature, established solely for trading or manufacturing purposes, may by a vote of a majority of their members, against the protest of the minority, wind up their affairs, and close their business, if, in the exercise of sound discretion, they deem it expedient to do so, and may sell the whole of their property to a new corporation taking payment in shares of the new corporation, to be distributed among the stockholders of the old corporation who are willing to take them."

The same author says (section 6694): "When we consider that it is not only competent for a majority of the stockholders, but also for a quorum of the directors, to assign all property of the corporation to a trustee for the payment of its debts, an act which in itself is substantially a dissolution of the corporation and a winding up of its affairs, the conclusion that it is within the power of the majority to take action to wind up any business corporation, in the absence of a statutory prohibition seems unavoidable."

To the same effect, see *Hitch v. Hawley*, 132 N. Y., 221, 30 N. E., 404, where it is said: "We think that when the interests of the corporation are so discordant as to prevent efficient management, and a large majority of both trustees and members wish to wind up its affairs, a dissolution thereof would be beneficial to the interests of its stockholders, because the object of its corporate existence cannot be attained."

While this is a general rule which we think appli-

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cable in all save the excepted cases which we have mentioned, it is peculiarly applicable under the facts of the present case, where the organization and operation of a corporation has not so far progressed that any of its stockholders would be materially prejudiced or financially injured by its dissolution and discontinuance, except as to prospective profits, which, at most, are speculative, and depend upon a harmonious and successful management of the business.

Here it is true there had been an incomplete organization, stock had been subscribed, temporary officers had been elected, and a scheme for future management, to some extent, had been devised, but no property had been bought, no liability had been incurred, except as between the stockholders, arising out of their subscription, no good will had been created, and, in short, nothing tangible had been accomplished.

Under such a status of affairs the majority decided to abandon, to discontinue, and dissolve upon terms which they deemed advantageous, and which were offered alike to the majority and minority.

A difference arose between the majority and minority, and a sharp controversy and divergence of views took place, bitterness of feeling was engendered, so that even the future success of the enterprise became problematic, and this was rendered still more acute by the withdrawal of Blizzard and Mahary from the new organization.

While the majority acted as they evidently thought in their own interest, they did not intend thereby to preju-

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dice the rights of the minority, but tendered to them the same benefits which they themselves were to receive.

The court of chancery appeals finds that there was, in fact, no fraud or bad faith on the part of the majority towards the minority in discontinuing and abandoning the enterprise.

In such case we think there can be no question of the right of the majority to dissolve the corporation, and to have the court decree such dissolution in order to avoid future complications and possible liabilities.

Nor do we think that the act of 1903 (Laws 1903, p. 268, c. 140), prohibits and renders void the acts of the majority in this case. That act simply declares unlawful and void all arrangements, contracts, agreements, trusts, or combinations between persons or corporations made with the view to lessen, to tend to lessen, full and free competition in the manufacture or sale of articles of domestic raw material.

There was no arrangement here between the two corporations, but it is simply a case where a majority of the stockholders in a new enterprise decided to abandon what in their opinion it would not be wise and profitable for them to continue.

Again it is said that the surrender of the charter in this case was not valid, because a large number of the votes cast in favor of the proposition were cast by those holding proxies, and it is said that there is no law authorizing such votes.

It is said that at common law there was no right to

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vote by proxy, and there is no general statute in this State authorizing such votes, and the right is not conferred by the charter of the particular corporation in question.

The charter does provide for an election of officers, by votes cast, either in person or by proxy, and we are aware that the practice and custom of voting shares of stock by proxy is in latter days, at least, almost universal, unless it is in some way expressly prohibited.

But whether this be so or not, the majority have ratified this action by joining in the present suit and making the request for a dissolution of the corporation, so that the point raised is a merely technical one.

It plainly appears that a majority of the stockholders are seeking and asking a dissolution and abandonment of this corporation, and we think that, under the facts, as found by the court of chancery appeals, they are entitled to have the relief they ask.

The decree of the court of chancery appeals is therefore affirmed, and the costs of the appeal will be paid by the defendant minority stockholders. The costs of the court below will be paid as adjudged by that court.

Hamblen County v. Cain.

HAMBLEN COUNTY v. CAIN.

(Knoxville. September Term, 1905.)

1. **UNCLAIMED FUNDS.** When paid to county by clerk do not escheat.

Funds paid into the county treasury under the statute requiring clerks of courts to pay into the county treasury all sums due to witnesses, officers, and others, that may have been collected by such clerks and which have been in their hands for more than two years, do not become the property of the county or State under the law of escheat.

Code cited and construed: Secs. 660, 661, 664 (S.); secs. 577, 578, 581 (M. & V.); secs. 520, 521, 524 (1858).

Case cited and overruled: Deaderick v. Washington County, 1 Cold., 202.

Case cited: Head v. Barry, 1 Lea, 753.

2. **SAME.** Are held by county as trustee.

Such funds, when paid into the county treasury, are held by the county merely as a trustee for the parties entitled to claim them.

3. **STATUTE OF LIMITATIONS.** Ten years bars action against clerk for unclaimed fees.

An action against a clerk to require him to pay such funds into the county treasury may be defeated by a plea of the statute of limitations of ten years.

Code cited and construed: Sec. 4473 (S.); sec. 3473 (M. & V.); sec. 2776 (1858).

Case cited and approved: Hughes v. Brown, 88 Tenn., 578.

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4. **SAME.** Does not run against county when acting as an arm of the State government.

The statute of limitations does not run against a county when seeking to enforce a demand arising out of, or dependent upon, the exercise of its governmental functions as an arm of the State government.

FROM HAMBLLEN.

Appeal from Chancery Court of Hamblen County.—
HUGH G. KYLE, Chancellor.

ESSARY & KING and HICKEY & HICKEY, for Hamblen County.

J. A. CARRIGER, for Cain.

MR. JUSTICE NEIL delivered the opinion of the Court.

This action was brought December 28, 1904, in the chancery court of Hamblen county, to recover of the defendant \$670.40, fees for witnesses, officers, etc., left in his hands uncalled for, that had accumulated prior to the year 1878, during the eight years of his service as clerk of the circuit court of the county next before the said year 1878. The bill charges that these moneys are still in his hands. A demurrer was filed, making the

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defenses of the ten-year statute of limitations, provided by Shannon's Code, section 4473, the statute of limitations of six years, the presumption of payment from long lapse of time, and laches. The chancellor sustained the first and last grounds stated, and dismissed the bill. Thereupon the complainant appealed and has assigned errors.

The action is brought under Shannon's Code, section 661, which reads as follows:

"The judge or chairman of the county court is also required in making settlements with clerks, to ascertain what amount of money is in their hands due to witnesses, officers, and others, which may have been collected by them from suitors, or from the State or county treasury, and which has been in the hands of the clerk for more than two years, and such sums shall be paid into the county treasury as other county revenue."

The preceding section (660) gives the chairman or county judge power to require the clerks of the various courts of his county to exhibit their books, records, etc., to him with a view to ascertaining revenue collected by such officer for the use of the county.

It was held in *Deaderick v. Washington County* that such moneys were due to the county under the familiar law of escheats. 1 Cold., 202. See, also, *Head v. Barry*, 1 Lea, 753. But in the later case of *Johnson v. Hudson*, 96 Tenn., 630, 36 S. W., 380, it was in effect, denied that funds of this character were collected by the county under the law of escheats. Special stress was laid upon

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section 664, which provides, in substance, that funds, when so paid into the county treasury, shall there remain subject to the demand of the original owners, and shall be paid to them on such demand, without limit of time. Construing this section along with section 661, it was held that the county acted merely as trustee for the parties, for the purpose of safeguarding their funds; that the funds when so paid into the county treasury were the property of such original owners, and not of the county.

This is the latest authority, and is controlling. It follows that the ten-year statute of limitations, which protects clerks, in terms, was a bar to the present claim. Under the facts stated, and the authority last cited, the trust relation created would not be of that character which would escape the effect of the statute of limitations. For the principles governing this subject, see *Hughes v. Brown*, 88 Tenn., 578, 13 S. W., 286, 8 L. R. A., 480.

Of course, the statute of limitations does not run against a county, when seeking to enforce a demand arising out of the exercise, or dependent upon the exercise, of its governmental functions as an arm of the State government. But the record before us does not present a case of that character.

It results that the first ground of demurrer stated must be sustained, and the bill dismissed, affirming the chancellor.

Let a decree be entered accordingly, with costs.

State v. Click.

THE STATE v. CLICK.

(*Knoxville*. September Term, 1905.)

1. **MALICIOUS MISCHIEF.** Election ballots are valuable papers. Election ballots are valuable papers within the meaning of the statute making it a misdemeanor to maliciously destroy any valuable papers of another.

Code cited and construed: Sec. 6496, ss. 14 (S.); sec. 4552, ss. 14 (Code of 1858).

2. **SAME.** Same. Sufficiency of indictment.

An indictment for malicious mischief in the destruction of election ballots is fatally defective where it fails to aver that said ballots were valuable papers, the property of the election commissioners, and that the conduct of the defendant was malicious.

FROM COCKE.

Appeal from the Circuit Court of Cocke County.—G. MC. HENDERSON, Judge.

ATTORNEY-GENERAL CATES and H. N. CATE, for the State.

W. J. & W. D. MCSWEEN, W. O. MIMS and R. B. HICKEY, for Click.

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MR. JUSTICE SHIELDS delivered the opinion of the Court.

This is an indictment preferred against the defendant, charging him with "unlawfully and willfully mutilating, defacing, and destroying election tickets" prepared by the election commissioners of Cocke county and furnished the election officers of one of the voting precincts of the county to be used in an election to be held under what is commonly known as the "Dortch Law." It was quashed upon the motion of the defendant, and the State has brought the case to this court for review.

It is evident that this indictment is predicated, and properly so, upon section 4652, subsec. 14, of the Code of 1858 (Shannon's Code, section 6496), which declares it to be a misdemeanor to maliciously destroy or secrete any goods, chattels, or valuable papers of another. The election tickets were valuable papers, and the property of the election commissioners of the county, and protected by this statute from malicious mutilation or destruction. There is, however, no averment in this indictment of these facts, or that the conduct of the defendant was malicious. These are essential elements of the offense, and for want of them the indictment is fatally defective. There is no error in the judgment of the trial court quashing it.

Condon v. Callahan.

CONDON *et al.* v. GEORGE W. CALLAHAN *et al.*

(Knoxville. September Term, 1905.)

1. **PARTNERSHIP.** Compensation to surviving partner for completing construction contracts, when.

A partnership contract for the construction of railroad work providing that the services of each member of the firm should be compensated for by similar services of the other member is construed to mean, not that neither partner should receive anything for his services, but that the work of the one should offset the work of the other; and the surviving partner is entitled to reasonable compensation for his skill, labor, and services in the completion of a valuable railroad construction contract left unfinished upon the dissolution of the partnership by the death of the other partner, especially where done with the express consent of the deceased partner's executor and sole legatee; and the allowance should be made in view of the large profits realized. (*Post*, pp. 287-298.)

Cases cited and approved: *Godfrey v. Templeton*, 86 Tenn., 167; *Brown v. De Tastet*, 1 Jacob, 284; *Cameron v. Francisco*, 26 Ohio St., 190; *Schenkl v. Dana*, 118 Mass., 236; *Griggs v. Clark*, 23 Cal., 427; *Newell v. Humphrey*, 37 Vt., 265; *Maynard v. Richards* (Ill.), 46 N. E., 1138, 1142, 57 Am. St. Rep., 151, 152; *Mellersh v. Keen*, 27 Beav., 236; *Airey v. Borham*, 29 Beav., 620; *Gilmore v. Ham* (N. Y.), 36 N. E., 826, 40 Am. St. Rep., 570.

Cases cited and distinguished: *Piper v. Smith*, 1 Head, 94; *Berry v. Jones*, 11 Hels., 207.

2. **SAME.** Same. Right of surviving partner to compensation for completing construction contract is not defeated by offer to settle for a certain sum as walking boss, when.

The fact that the surviving partner offered to accept a certain sum for his services as walking boss, but not as compensation for completing a valuable railroad construction contract after

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the dissolution of the partnership by the death of the other partner made for the purpose of arriving at a settlement which was not accomplished, does not affect his right subsequently to recover for his services in completing such contract. (*Post*, pp. 289, 290, 298.)

3. **SAME.** Employment of railroad engineer by railroad construction contractor is not against public policy, when.

Where, in the performance of a contract for railroad construction, one of the members of the contracting firm, with the consent or knowledge of the other, employed and paid the engineer of the railroad to do certain work for the firm, which was not in conflict with the engineer's duty to the railroad company, and it not appearing that the railroad company was ignorant of such employment and services, it was not contrary to public policy to such an extent as to disallow a credit for the expenditure. (*Post*, pp. 298, 299.)

4. **SAME.** Firm entitled to same average profit on subcontract taken from it by one member as upon other subcontracts, when contract so provides.

Where the contract for railroad construction provided that either member of the contracting firm might subcontract a part of the work from the firm, to be dealt with as other subcontracts, the firm is entitled, as against one of its members subcontracting a portion of the work, to the same average profit made by the firm on the work done by the other subcontractors. (*Post*, pp. 288, 289, 299-301.)

5. **SAME.** Surviving partner is not liable for interest on fund in bank awaiting settlement, and pending suit for settlement, when.

The surviving partner is not liable for interest on money deposited in bank, in the firm name, and not used by him, and not yielding any interest or profit to him, awaiting settlement between the parties, upon terms of which they disagreed, without his fault, and pending a suit for a settlement. (*Post*, pp. 289, 301.)

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FROM KNOX.

Appeal from the Chancery Court of Knox County.—
JOSEPH W. SNEED, Chancellor.

WEBB, M'CLUNG & BAKER, for complainants.

SHIELDS, CATES & MOUNTCASTLE, for defendants.

MR. JUSTICE WILKES delivered the opinion of the Court.

This is a bill by the executrix of M. J. Condon, deceased, to settle up the partnership that existed between M. J. Condon and the defendant Geo. W. Callahan.

This partnership was entered into for the purpose of constructing certain railroad work, and there is no controversy about its terms, nor the proportionate interests of the parties thereunder.

The partnership entered into an important and very expensive contract for railroad construction around Keogan Tunnel, near Harriman, Tenn. Soon after the work was commenced M. J. Condon was killed, and the work was carried on and the contract was completed by Callahan, as surviving partner, by the consent of the executrix.

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It was one of the terms of the partnership that the services of each member of the firm should be compensated for by similar services of the other member of the firm, and there was no contract as to the status of the parties in the event either died.

The profits were from time to time divided and when a final settlement was attempted to be made Callahan claimed certain items of expense which it was alleged were not in accord with the partnership contract.

Thereupon this bill was filed to have the partnership of M. J. Condon and Callahan wound up and the rights of the parties determined.

The contract resulted in a profit of some \$67,000, and there was a fund of \$6,119.87 in the East Tennessee National Bank to the credit of M. J. Condon & Co., where it was originally deposited, and where it had ever since remained until paid into court.

The chancellor passed upon the rights of the parties, and declared the proportion in which they should share these funds, and adjudicated the costs. The complainants prayed a broad appeal, and the defendant Callahan prayed an appeal from so much of the decree as failed to charge the estate of M. J. Condon with twelve and one-half per cent. profit upon the gross amount of work which was sublet by M. J. Condon & Co. to Ed. L. Condon and M. J. Condon on a prior contract in South Carolina, and because he was refused proper salary as walking boss in connection with the work at Harriman, and for his services in completing the Harriman contract.

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In the court of chancery appeals a number of assignments were made by both parties, and the decree of the chancellor was affirmed, except that the defendant Callahan was allowed an additional sum of \$903.73, on account of the South Carolina contract, and both parties have appealed to this court.

The first assignment made by the defendant Callahan is that the chancellor and the court of chancery appeals should have allowed him \$6,300 compensation for carrying out and completing the contract made by M. J. Condon & Co. to build the railroad around Keogan Tunnel, which resulted in a profit to the firm of about \$67,000. For this service he was actually allowed by the chancellor and the court of chancery appeals the sum of \$2,700.

Upon this feature of the case the complainants assign as error that Callahan should not have been allowed any compensation whatever for his services after the death of his copartner, M. J. Condon.

We will consider these assignments of error together.

The court of chancery appeals report that it was a provision of the contract between the partners that each of them should devote his entire time to the business of the partnership and that the work of one partner should offset the work of the other.

That court reports that Callahan, in negotiating with Mrs. Condon and her son for a settlement, was willing to accept the \$2,700 for his services. They further report that she at first agreed to this allowance, but afterwards repudiated her agreement.

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That court says that, while the weight of the proof tends to show that Callahan performed double service, in addition to the service of a walking boss, and that his extra service, aside from his walking boss service, was worth the sum claimed by him, still that his own valuation of his services when the settlement was attempted between him and Mrs. Condon was the most reasonable basis to accept.

That court declined to allow Callahan \$150 per month for services as walking boss, because those services were rendered as surviving partner, in the prosecution and completion of the work; and the amount allowed him of \$2,700 was allowed him by that court presumably upon the idea that it was a proper compensation for his services in carrying out the contract, and these services were rendered as surviving partner.

So that, as we view the findings of the court of chancery appeals, the \$2,700 allowed to Callahan by that court was for his services as surviving partner, and not simply as walking boss.

The question presented, then, is whether, under the contract between the partners and the facts developed in this record, the defendant Callahan should be allowed anything for his services as surviving partner, and, if so, how much.

As we construe the contract, it is not that neither partner should receive anything for his services, but that the work of the one should offset the work of the other. In other words, it was contemplated that the services of

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each would be worth the same, and that each should receive his share of the compensation in the services of the other.

On account of the death of M. J. Condon, he was unable to comply with his part of the contract and do his part of the service.

We think the law in such case would imply that the partner doing the whole of the work should have reasonable compensation for that part of it which would have been done by the deceased partner, if he had lived; or, in other words, he was entitled to compensation for that part of his work which his deceased partner would have contributed.

Now, the general rule is that, as between partners, the surviving partner is entitled to make no charge for his services in winding up the partnership. Still this rule does not apply in all cases, but only to cases where the business is immediately put an end to and no further work is done, except to close up the matter of account as between the partners, pay the debts, and distribute the surplus, if any.

In the case of *Godfrey v. Templeton*, 86 Tenn., 167, 6 S. W., 49, it is said:

"It is well settled that surviving partners will not generally be allowed compensation for services rendered in winding up and settling the business of the firm; but that is not this case. The business of the firm was continued for the sake of profit, and the object was accomplished, resulting beneficially alike to the surviving partners and

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the estate of the deceased partner; the continuance of the business even for a longer time being expressly authorized by the will of the deceased partner, and with the knowledge and consent of the administrator with the will annexed."

In the present case the contract was continued by Callahan, as surviving partner, with the express consent of the executrix and sole legatee. It was necessary that it should be so continued, in order to realize the benefits of the existing contract by completing it and to prevent loss by abandoning it; and it did result in a profit of about \$50,000 to the representatives of M. J. Condon, and about \$17,000 to Callahan.

Bates on Partnership states the rule as follows:

"The principle applies to the burden of winding up after death, and the surviving partner can claim no extra compensation for it, the death of a copartner being one of the risks necessarily incurred by each; but the rule applies merely to the simple and immediate winding up by collecting the assets, paying the debts, and accounting for the surplus, as is necessarily involved in the creation of the partnership and implied in the contract. But for time, skill, and trouble expended beyond this, and inuring to the general benefit, the reason of the rule fails, as where, after dissolution, a partner successfully continues the business of the firm, using the original capital, good will, or other assets, and a benefit is received from his efforts, he is allowed to deduct from the profits a compensation, varying according to

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the state of the account, the nature of the business, the difficulty and results of the undertaking, and, perhaps, its necessity or desirability.

"The most usual application of this limitation of the principle is the case of a surviving partner continuing the firm business or completing the enterprise of the partners.

"In *Brown v. De Tastet*, 1 Jacob, 284, where the surviving partner continued the business with the original capital and was required to account for the profits, allowances were ordered to be made to him, not necessarily as wages, but such as the master should find proper.

"In *Cameron v. Francisco*, 26 Ohio St., 190, where the surviving partner, without being under contract to do so, continued the business (the publication of a newspaper), and by thus being enabled to sell it as a going concern, preserved a valuable good will which would otherwise have been lost, and the personal representatives, on electing to share the profits, were required to deduct a reasonable compensation.

"In *Schenkl v. Dana*, 118 Mass., 236, the property of the firm consisted of patents for improvements in weapons of war and valuable contracts with the government, and a manufactory and stock for fulfilling them, and the surviving partner, having completed the contracts and entered on new ones, was held entitled to extra compensation for all services in excess of mere winding up.

"In *Griggs v. Clark*, 23 Cal., 427, where the value of the assets was enhanced by the labor and time of the

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surviving partner to the extent of \$6,000, he was allowed \$1,400 out of the profit from the enhanced value.

"In *Newell v. Humphrey*, 37 Vt., 265, partners in the business of buying cattle on commission had canvassed the territory, and ascertained who would have cattle to sell, without contracting with them, and then one partner died. Much time and labor having been spent, the commissions on these inchoate transactions were held to be partnership assets, but an allowance to the surviving partner for his time and expenses in completing them was held just and proper."

Bates on Partnership, sections 772, 773, pp. 821-824.

"The rule that a surviving partner is entitled to no extra compensation applies to his services in winding up the partnership. The winding up or settling of the partnership affairs after the death of one of the partners may be said to consist, as a general thing, in selling the property, receiving moneys due the firm, returning the capital contributed by each partner, paying the firm debts and advances of the partners, and dividing the profits. Where, however, the surviving partner renders services in excess of the mere winding up of the partnership affairs, he will, under certain circumstances, be entitled to compensation for such excess." 17 Am. & Eng. Ency. of Law, 1154, 1183; 2 Lindley on Partnership, 1046; Collyer on Partnership, section 328; Parsons on Partnership, section 346. It is said in Bates on the Law of Partnership, at section 773: "The rule applies merely to the simple and immediate winding up, by collecting

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the assets, paying the debts, and accounting for the surplus, as is necessarily involved in the creation of the partnership and implied in the contract; but for time skill, and labor expended beyond this, and inuring to the general benefit, the reason of the rule fails. The most usual cases, where the surviving partner is allowed compensation, are cases where he successfully continues the business of the firm, or successfully completes an enterprise in which the firm has been engaged, so that a substantial benefit is received from his efforts. The amount of compensation will vary according to the state of the accounts, the nature of the business, the difficulty and results of the undertaking, and its necessity or desirability." 2 Bates on Partnership, section 773; Am. & Eng. Ency. of Law, 1183. "If he performs such extra services with the consent of the representatives of the deceased partner, such consent is sometimes an important factor in determining the question whether he is entitled to compensation. His claim to compensation will in connection with the circumstances mentioned, be looked upon with favor, if the representatives of the deceased partner elect to share in the profits realized from his services as surviving partner." *Maynard v. Richards* (Ill.), 46 N. E., 1138, 1142, 57 Am. St. Rep., 151, 152.

"The business may be of such a character that, on the dissolution of the partnership, it cannot be closed at once to advantage, and it is therefore continued with the expressed or implied assent of all the partners, and by a like assent is committed to the care and manage-

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ment of some only of them. In such cases the partner or partners in possession of the assets and continuing the business will in equity be regarded as in some respects occupying the position of trustees, and as such entitled to be compensated for services in the management of the trust property; and, whether or not any personal claim can be maintained therefor against the other partners, the value of the services may at least be deducted from accounting for profits realized from the business. *Mellersh v. Keen*, 27 Beav., 236; *Airey v. Borham*, 29 Beav., 620; *Newell v. Humphrey*, 37 Vt., 265; *Schenkl v. Dana*, 118 Mass., 236." *Gilmore v. Ham* (N. Y.), 36 N. E., 826, 40 Am. St. Rep., 570.

The cases of *Piper v. Smith*, 1 Head, 94, and of *Berry v. Jones*, 11 Heisk., 207, 27 Am. Rep., 742, are not in conflict with these authorities, or with the decisions of this court in the case of *Godfrey v. Templeton*, 86 Tenn., 161, 6 S. W., 47.

In the case of *Berry v. Jones* a bill was filed to wind up a partnership, and one of the partners insisted upon his right as surviving partner to act as receiver in winding up the partnership affairs. This court simply held that the surviving partner was not entitled to compensation for his services in winding up the affairs of the partnership; that is, in selling the assets, collecting the moneys due the firm, paying its debts, and distributing the profits among the partners. This is the general rule as laid down by all the authorities.

The case of *Piper v. Smith*, 1 Head, 94, was also a

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case of winding up a partnership. It is true the firm at the time of the death of one of the partners was building some houses for itself, which had to be completed for the benefit of the firm, and it was there said that the surviving partner was not entitled to compensation for his services in superintending the finishing of said buildings. The question of carrying out an enterprise with a third party was not involved in that suit.

We are of opinion that, under the law and the facts of this case, the defendant Callahan was entitled to reasonable compensation for his skill, services, and labor in completing the contract, and the allowance should be made in view of the results realized.

It is left a little indefinite by the finding of the court of chancery appeals and under the claim of Callahan, what this amount should be, or, rather, the length of time he was engaged in completing the contract is differently stated—in some places at eighteen months, and at other places at twenty-three months; and the defendant Callahan claims that he is entitled to compensation at the rate of \$300 per month for the time thus employed.

The court of chancery appeals, in effect, reports that his services were worth all or more than he claims.

Upon the basis of eighteen months, the compensation would be \$5,400; upon the basis of twenty-three months, it would be \$6,900. The defendant makes claim in round numbers for \$6,300.

Under this state of the record, we think we should fix the amount at \$6,300.

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The offer to take \$2,700 on the part of Callahan was one based upon his services as walking boss. It was not offered as compensation to carry out the contract. It may be, if the proposed settlement had been accepted, no claim would have been made for services as surviving partner. The offer, moreover, was tentative merely, in order to arrive at a settlement. When Callahan was put to his legal rights, he insisted upon reasonable compensation, and the court of chancery appeals report that \$6,300 is reasonable.

The complainant assigns as error that defendant Callahan should have been charged personally with \$3,100, which he claims to have paid to G. Bottinger, the engineer of the railroad company.

It is said that such payment, if made, was for the purpose of bribing and corrupting the engineer of the railroad company, and was immoral, and against public policy, and Callahan should not have compensation for the same.

It appears that this man Bottinger was employed with the approval of M. J. Condon before he died: and the court of chancery appeals report that the work which he was employed to do, and which he did do, was not in conflict with his duty and work with the railroad company.

That court says that the evidence wholly fails to show any fraud or collusive purpose in the employment of this man to beat or defraud the railroad company or to contravene any rule of sound public policy. No effort

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was made to conceal his employment from the railroad company, and it does not appear that the railroad was ignorant of his employment or the nature of the services he was rendering to the defendant.

That court continues that, in addition to all this, it reasonably appears from the evidence that complainants knew that he was employed, or that such services as Bottinger rendered were being paid for as the work progressed, and charged up to the general expense account; and, indeed, it does not appear that they ever objected to allowing the credit assailed.

Under this state of facts we think the credit of \$3,100 was properly allowed as a credit to Callahan, and the assignment of error complaining of the same is not well taken.

Complainants' fourth assignment of error is that the court of chancery appeals erred in charging M. J. Condon's estate with \$3,614.95, profits alleged to have been made on a subcontract with M. J. Condon and Ed L. Condon in South Carolina.

It appears that Callahan and M. J. Condon, previous to the contract now under consideration, had a contract to build 81 miles of track from Cheraw to Columbia, S. C., for the Seaboard Air Line. One of the provisions of that contract was that either member of the firm might subcontract enough work from the firm to give employment to any men and teams which either party might own or have individually, and which might not be sold to M. J. Condon & Co., and that, in the event that either

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or both of said parties should subcontract for any part of said eighty-one miles, he or they should be dealt with as other subcontractors on said line of eighty-one miles.

M. J. Condon did sublet a part of this work to himself and Ed L. Condon at the same price that the company was to get from the railroad company.

The company made an average profit of twelve and one-half per cent, on the aggregate amount of the work done under other subcontractors, and this rate of twelve and one-half per cent under the contract to the Condons would amount to \$3,614.95.

Condon died before there was a settlement of the South Carolina business, as between himself and his partner, Callahan, and this matter was never adjusted between them.

The court of chancery appeals finds that, under the South Carolina contract, this sum belonged to the firm to be distributed in the proportion called for by that contract; that is, three-fourths to Mrs. Condon, as executrix, and one-fourth to Callahan. This one-fourth would amount to \$903.73.

The court of chancery appeals reports that this sum should be allowed to Callahan in the adjustment of his account with the Condon estate, and that any delay in claiming the same was satisfactorily accounted for by the fact that there had never been any final settlement of the South Carolina business, and that Condon had died unexpectedly and suddenly, just as the firm was entering upon a new and important construction job,

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and in addition the object of the bill was to wind up the partnership of Condon & Co., and this item, being unadjusted, legitimately came within the scope of the settlement.

Under these facts, we are of opinion that the court of chancery appeals was correct in allowing Callahan this credit of \$903.73.

The complainants' fifth assignment of error is because the court of chancery appeals refused to charge Callahan with interest on the money in his hands and under his control, belonging to the firm, after the 25th of January, 1902.

It appears that, when the settlement was attempted between Callahan and Mrs. Condon, as executrix, there was in the East Tennessee National Bank, to the credit of Condon & Co., the sum of \$6,119.87. This account had been opened by M. J. Condon in his lifetime, and Callahan after his death continued to make deposits of all the firm money to the same account, and it had all the time remained in the bank to the credit of Condon & Co. Callahan never used this money in any way, and never realized any interest or profit upon the same. It stood to the credit of M. J. Condon & Co., awaiting settlement between the parties, upon the terms of which they could not agree.

We are of opinion that Callahan is not liable for any interest on this amount.

The sixth assignment of complainants, in reference to taxation of costs, is not well made.

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Under our view of the case, we are of opinion that complainant should pay all the costs of the appeal.

The decree of the court of chancery appeals is affirmed, except as to the item of compensation to be allowed Callahan for completing the contract and winding up the partnership, and as to that and the adjudication of costs it is modified, so as to allow Callahan compensation of \$6,300, instead of \$2,700, as fixed by the court of chancery appeals.

The costs of the appeal will be paid as heretofore indicated, the costs of the court below will be paid as adjudged by the chancellor, and the cause is remanded to the court below for further proceedings.

Murray v. State, ex rel. Luallen.

MURRAY v. STATE, *ex rel.* LUALLEN.

(*Knoxville*. September Term, 1905.)

1. **RESIGNATION OF PUBLIC OFFICER.** Irrevocable when accepted.

The resignation of a public officer, when accepted by the proper authority, is irrevocable, and cannot be withdrawn, although an attempt to withdraw it is made before the arrival of the date at which the resignation, by its terms, is to take effect.

Case cited and approved: State, ex rel., v. Grace, 113 Tenn., 9.

2. **COUNTY JUDGE.** Jurisdiction of.

The county judge, or chairman of the county court, has all the jurisdiction belonging to the county court, except such as is expressly, or by reasonable implication, devolved upon the quarterly court.

Act cited and construed: 1889, ch. 153.

Case cited and approved: Johnson v. Brice, 112 Tenn., 59.

3. **SAME.** Proper officer to act upon resignation of justice of the peace.

The county judge, or chairman of the county court, is the proper officer to receive and act upon the resignation of a justice of the peace.

Code cited and construed: Sec. 442 (S.); sec. 408 (M. & V.); sec. 353 (1858).

FROM CAMPBELL.

Appeal from Circuit Court of Campbell County.—G.
Mc. HENDERSON, Judge.

Murray v. State, ex rel. Luallen.

PETERS & AGEE and JOHN JENNINGS, for Murray.

POWERS & OWENS, TEMPLETON, LINDSAY & TEMPLETON,
and LUCKY, SANFORD & FOWLER, for Relator.

MR. JUSTICE NEIL delivered the opinion of the Court.

This is a petition, in the nature of a *quo warranto*, seeking to have Murray, who was the defendant thereto, restrained from exercising the functions of justice of the peace of Campbell county, on two grounds: First, that he had resigned his office; and, second, that he had been permanently removed from the civil district for which he was elected. Murray answered, admitting the filing of his resignation with the county judge, but claiming it was withdrawn prior to the arrival of the time when it was to take effect and before its acceptance by the county court, and also denying the averment of the petition as to his removal. The case was tried by the circuit judge without the intervention of a jury, and judgment was rendered sustaining the petition, in so far as it alleged an irrevocable resignation of the office, and enjoining the defendant from a further exercise of its functions. A written opinion was filed, which, while not requested by either party to the lawsuit, yet was made a part of the record by consent of the parties. The finding of facts in this opinion is fully sustained by the evidence in the cause. The important facts so found may be briefly stated as follows:

(1) That Murray resigned his office of justice of the peace in a writing, made and signed by him and filed

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with the county judge of Campbell county on November 19, 1903, and the same was on that day accepted by the county judge, and the clerk of the county court, under his orders, spread upon the minutes of the court both the resignation and its acceptance. In this writing Murray provided that his resignation should "take effect on Tuesday after the first Monday in January, being the 5th day of January, 1904," but added, "I respectfully ask that this resignation be acted upon now, to take effect at that time."

(2) That on December 1, 1903, the clerk of the county court gave notice to the board of election commissioners of Campbell county of the vacancy in the office of justice of the peace caused by Murray's resignation, and that board, in pursuance of the law, caused an election to be held on the 22d of March, 1904, to fill the vacancy, at which the relator, Luallen, was legally elected justice of the peace to fill out the unexpired term of Murray. That on the 24th of March, 1904, a commission was issued to Luallen by the governor of the State, and on the 26th day of March, 1904, he was duly qualified to fill out this unexpired term.

(3) That subsequent to the filing of his resignation the plaintiff in error undertook, in a paper writing addressed to the county judge, to withdraw the same. This attempted withdrawal was made before the time the resignation was to take effect, but no action was taken upon it by the county judge.

Two errors are assigned by the plaintiff in error upon the judgment of the lower court.

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In the first it is insisted that, inasmuch as the resignation was to take effect in the future, notwithstanding its acceptance by the county judge (conceding his right to accept), yet this act of acceptance did not exclude the right of withdrawal, if exercised at any time before the day fixed in the resignation for the vacation of the office. We think this contention unsound. By its terms the resignation was absolute and unconditional. It requested immediate acceptance, and, if the county judge had the authority to act, we have no doubt his action placed it beyond the power of Murray to withdraw. While it may be true the precise question here presented has not been determined in this State, yet we think the principle announced in *State, ex rel., v. Grace*, 113 Tenn., 9, 82 S. W., 485, is controlling.

In that case it appears Grace delivered to the legislative council of Memphis, of which he was a member, his unconditional resignation (to take immediate effect), which was duly and formally accepted, and an entry both of the resignation and its acceptance was made upon the minutes of the council. Subsequently and with the consent of the council Grace undertook to withdraw his resignation. The commissioners of election for Shelby county, regarding the acceptance of this resignation as vacating the office which Grace had held, ordered a public election, at which the relator was chosen to fill the vacancy. This court held, upon these facts, that the acceptance of the resignation *ipso facto* vacated the office, and that the act could not be undone, even with the

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consent of the body of which Grace had been a member, and sustained the title of the relator. In the course of the opinion delivered by Justice Shields, it is said: "Official robes cannot be put off and assumed at the pleasure of individuals or officers. Public interest requires that all possible certainty exist in the election of officers, and the beginning and expiration of their term by law or resignation, and forbids that either shall be left to the discretion and vacillation of the person holding the office or the officer or body having the appointing power."

The same public policy which required the holding in that case dictates the application of the principal in the present. The resignation, with its acceptance, was no more absolute in that than in the case at bar. The mere fact that the one was to take effect immediately and the other at a date in the future we think of no import. In the one, as much as in the other, public interest requires that vacillation of purpose on the part of the person resigning should not be encouraged, and the discretion of the accepting tribunal, when once exercised, should not be reconsidered.

In the next place, however, it is insisted that the county judge was without authority to accept this resignation. We think that this insistence is unsound. The Code provides that a "justice of the peace who wishes to resign shall make his resignation to the county court of the county of which he may be justice." Shannon's Code, section 442. It will be observed that it is not indicated

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here whether this resignation is to be made to the quarterly county court, or to what was known as the "quorum court," and there is no provision found in the Code or elsewhere, requiring that it should be made to the first named of these courts. By the terms of chapter 153, p. 293, of the Acts of 1889, the office of county judge of Campbell county was created. Under this act, as well as the general provisions of the Code, this officer, we think, succeeded to all the powers of the monthly quorum court. In *Johnson v. Brice*, 112 Tenn., 59, 83 S. W., 791, there is an elaborate review of the Code and statutory provisions fixing and regulating the jurisdiction of these respective courts, and it was there announced that "the county judge or chairman has all jurisdiction belonging to the county court, except such as is expressly or by reasonable implication devolved upon the quarterly court."

We find nowhere, either expressly or by reasonable implication, the power to accept such resignation devolved upon that court, and we think it follows necessarily from the doctrine announced in that case that the county judge of Campbell county, sitting as and in the place of the quorum court, was the proper officer to receive and act upon this resignation.

It follows, therefore, that the assignments of error referred to are not well taken, and the judgment of the circuit court must be affirmed.

Norman & Co. v. Edington, Groner & Griffiths.

NORMAN & CO. v. EDINGTON, GRONER & GRIFFITHS *et al.*

(Knoxville. September Term, 1905.)

RAILROADS. Laborer's lien. Notice must be given by claimant himself, and not by assignee of claim.

Acts of 1891, ch. 98 (Shan. Code, secs. 3580-3586) provides, among other things, that every contractor, laborer, materialman, or other person or persons, who performs any part of the work in grading any railroad company's roadway, or who constructs or aids in the construction or repair of its culverts and bridges, or furnishes cross-ties, or masonry or bridge timbers used in the building of such railroad, or aids in the laying of its track, or who performs any valuable services of which any such railroad company receives the benefit, shall have a lien on such railroad for the value of such work and labor done, or material furnished, or services rendered; but to secure this lien such subcontractor, laborer, or materialman shall within ninety days after such work and labor is done, or such materials are furnished, or such services are rendered, notify in writing any such railroad company that such lien is claimed.

Held:

(1) That written notice to the railroad company within ninety days is an essential prerequisite to the enforcement of the lien given by the statute.

(2) The notice must be given by the subcontractor, laborers, or materialmen themselves, and the assignees of claims for work and labor done in the construction of a railroad cannot obtain the benefit of the lien provided by the statute, where their assignors had failed to give the required notice to the railroad company, although, subsequent to the assignment, and within the statutory period, the assignees themselves gave the notice to the railroad company of their intention to claim the lien as such assignees.

Norman & Co. v. Edington, Groner & Griffiths.

Act cited and construed: 1891, ch. 98.

Case cited and approved: Duncan v. Hawn, 104 Cal., 10, 37 Pac., 626.

Cases cited and distinguished: Couper v. Gaboury, 69 Fed. R., 7, 16 C. C. A., 112; Perry v. Duluth Transfer Co., 56 Minn., 306, 57 N. W., 792; Union Trust Co. v. Walker, 107 U. S., 596, 27 L. Ed., 490; Burnham v. Bowen, 111 U. S., 776, 28 L. Ed., 596.

FROM KNOX.

Appeal from the Chancery Court of Knox County.—
JOSEPH W. SNEED, Chancellor.

TEMPLETON, LINDSAY & TEMPLETON, for Norman & Co.

JOHN W. GREEN and CORNICK, WRIGHT & FRANTZ, for
Edington, Groner & Griffiths *et al.*

MR. CHIEF JUSTICE BEARD delivered the opinion of the
Court.

The single question raised by the facts found by the court of chancery appeals in the present case is whether complainants, as assignees of claims for work and labor done in the construction of the Knoxville, La Follette & Jellico Railroad Company, by the employees of an insolvent subcontractor, can enforce a statutory lien for these claims, where their assignors (the employees) had

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failed to give notice to the railroad company of the fact that they relied upon this lien for the security of these claims, but subsequent to the assignments the complainants themselves, as such assignees, gave this notice.

The answer to this question is to be found in the statute; for independent of this the assignors of complainants, not being in privity with the railroad company, would have had no right against its property, and, *a fortiori*, the complainants, as such assignees, would have none.

The statute relied upon by complainants to sustain their claim is found in chapter 98 of the Acts of 1891, p. 215. The first section of this statute creates the lien and provides the remedy for the unpaid employees of a defaulting subcontractor who does work upon a railroad. This section, subdivided, is carried into sections 3580, 3581, of Shannon's Code. Section 3580 provides as follows: "Every subcontractor, laborer, materialman or other person, or persons, who performs any part of the work in grading any railroad company's roadway, or who constructs or aids in the construction or repair of its culverts and bridges, or furnishes cross ties, or masonry or bridge timbers . . . used in the building . . . of such railroad . . . or aids in the laying of its track . . . or who performs any valuable services . . . by [of ?] which any such railroad company receives the benefit . . . shall have a lien on such railroad . . . for the value of such work and labor done, or material furnished, or services rendered, as hereinbe-

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fore set out and specified . . . "Section 3581 is in the following words: "But to secure this lien such subcontractor, laborer, materialman, or other person or persons rendering the hereinbefore mentioned services, shall within ninety days after such labor and work is done . . . or such materials are furnished, or such services are rendered, notify in writing any such railroad company . . . that said lien is claimed . . ."

We think the terms of these two sections are so plain as to require but little, if any, interpretation. Confessedly, the assignors of these complainants who did the work and labor in question upon the roadway of the defendant railroad company are within one of the classes provided for in section 3581, and, their claims being unpaid, they might have enforced a lien against the property of the company for the satisfaction of these claims. To do this, however, notice to the company, under the terms of section 3581, was an essential prerequisite. And we think that it was equally essential that this notice should be given by the right party and at the right time. To obtain the benefit of the lien given by section 3580, it was necessary that parties relying upon such lien should themselves give this notice. The provision of the statute is that "such subcontractor, laborer, materialman, or other person or persons, rendering the hereinbefore mentioned services," shall within ninety days, etc., notify in writing, etc. We see no reason for bringing an assignee of such laborer within the spirit or the letter of this statute by judicial construction than there would be for ex-

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tending the time for the giving of the notice beyond the period of ninety days therein prescribed. In each of these particulars the statute is free from ambiguity.

We are unable to find, as is urged by the counsel of the complainant we should, anything in the terms, "or constructs, or aids in the construction," or, "by which any such railroad receives the benefit," found in section 3580, which authorizes a court to give the benefit of this statute to one who acquires the claim of a laborer secured by an inchoate lien, as in the present case, and who subsequently undertakes to convert this into a fixed lien by giving the notice.

Complainants, through their counsel, rely for authority to support their contention upon a class of cases of which *Couper v. Gaboury*, 69 Fed., 7, 16 C. C. A., 112, and *Perry v. Duluth Transfer Co.*, 56 Minn., 306, 57 N. W., 792, are two, which hold that, under statutes providing for liens in favor of persons who "perform" labor, a person, such as a contractor, who furnishes the labor of his employees in doing the work, is to be considered as the one who did the work, and, as such, entitled to the lien. These authorities, however, cannot avail complainants, for the notice which they gave to the railroad company, and upon which they must stand, is that of assignees of laborers who did work in the construction of its roadway. In these notices there is no suggestion that complainants claimed the lien as the furnishers of labor through their employees, but, to the contrary the company is notified that they rest their claim for the secur-

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ity of this lien upon the assignments made to them by the laborers, whose names, with the amounts due to each, are tabulated therein. In addition, it is found as a fact by the court of chancery appeals that they did not furnish labor, but acquired their claims by dealings with the laborers.

Complainants also rely upon *Union Trust Co. v. Walker*, 107 U. S., 596, 2 Sup. Ct., 299, 27 L. Ed., 490, and *Burnham v. Bowen*, 111 U. S., 776, 4 Sup. Ct., 675, 28 L. Ed., 596, as authority for their insistence. An examination of these cases discloses, however, that they did not involve the question of either a common-law or statutory lien, but in both of them the court recognized and applied the now familiar rule that in equity the earnings of a railroad in the hands of a court's receiver constitutes primarily a fund for the payment of expenses incurred in its operation, and, if they be diverted for the betterment of the railroad, or in any other way to the benefit of the holders of the mortgage debt, then out of the proceeds of the sale of the property, to the extent of such diversion, parties who have contributed labor or money to the operation of the road by the receiver will be provided for, and in the first of these cases an assignee of such a claimant was given the benefit of this equitable rule.

Neither of these cases, nor any other, to which we have been referred, raises the question we are here considering; that is, whether an assignee of laborer's claim under such a legislative enactment as ours can perfect

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an inchoate lien by giving notice as assignee after he had acquired the claim.

After all is said each case depends upon the terms of the statute under which it arises. The result is that opinions of other courts based on statutory provisions, either unknown to the tribunal dealing with the case in hand, or, unlike those which control it, are of but little value as authority. It is true, however, that a majority of the courts hold that a lien like the one created by this statute is so far personal that in the absence of statutory authority there can be no assignment of the right to perfect or create it. It is said in *Duncan v. Hawn*, 104 Cal., 10, 37 Pac., 626: "Until perfected by filing the proper notice, it is a mere inchoate right, personal to the individual, which he may choose to perfect or not, at his pleasure, and which until perfected has no tangible existence as property, and, of course, as such is not the subject of transfer." It would no doubt be otherwise with regard to the assignment of a claim the lien for the security of which had already been fixed by a statutory notice given within the proper time by the assignor.

Other questions were made at the bar, but these were answered by the facts found by the court of chancery appeals, leaving the one we have been considering as only open for discussion. We are satisfied that the holding of that court on this question is correct, and in all things its decree is affirmed.

Martin v. McCrary.

MARTIN et al. v. MCCRARY et al.

(*Knosville*. September Term, 1905.)

1. **NEGLIGENCE.** Care required in using dangerous instrumentalities.

Persons engaged in a lawful business and using therein a dangerous instrumentality, such as a steam engine in threshing wheat, are required to use that degree of care and prudence commensurate with the danger to which property is exposed by them in the lawful conduct of their business.

Case cited and approved: *Railroad v. Fort*, 112 Tenn., 432.

2. **SAME.** Presumption of, from destruction of property—burden of proof.

Where plaintiff's wheat was destroyed by fire communicated from defendant's threshing engine, a presumption of negligence arose from the fact that the fire was set from sparks escaping from the engine and the burden was on the defendant to show absence of negligence.

3. **SAME.** Dangerous instrumentalities must be kept up to the state of the art.

In an action for the destruction of wheat by fire communicated by defendant's threshing engine, the defendants cannot escape liability by proving that the engine did not emit sparks more copiously "than was natural for any engine of similar kind and construction," but must show in addition that the engine, in respect of fire precautions, is up to the state of the art at the time the fire occurred.

4. **SAME.** Same. Duty of inspection.

Where a threshing engine was equipped with a double netting in order to prevent the escape of sparks, its operators are guilty of negligence in failing to make at least a daily inspection thereof.

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5. SUPREME COURT. Will correct improper application of the law to special facts found by the trial judge.

Where in an action for the destruction of grain by fire caused by defendant's threshing engine, the trial judge specially found facts establishing defendant's negligence, general findings that defendants were not negligent in failing to observe defects in the engine or in operating the same, were conclusions of law and erroneous as improper applications of the law to the special facts found and will be corrected by this court.

FROM MONROE.

Appeal in error from the Circuit Court of Monroe County.—GEO. L. BURKE, Judge.

STATEMENT BY MR. JUSTICE NEIL.

Action by the owner of a wheat crop against the owner of a steam thresher for negligently setting fire to the wheat in the stack by means of sparks emitted from the engine, whereby the crop was destroyed.

The case was tried before the circuit judge without the intervention of a jury, with the result that he dismissed the plaintiffs' case and rendered judgment against them for the costs of suit. From this judgment they have prosecuted a writ of error, also an appeal, and assigned errors.

The circuit judge was requested, under the statute, to make written findings of fact and law, and he did so.

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The facts found, so far as material, were as follows:

The defendants, having contracted to thresh plaintiffs' wheat, set their steam thresher at plaintiffs' stacks and were engaged in threshing the grain, when a spark from the engine fell upon and set fire to a wheat stack, and destroyed the entire crop, to the value of \$166.75. This occurred July 22, 1904.

The spark arrester on the engine "was of the kind generally in use." However, some time prior to the beginning of the season for threshing wheat, defendants were using this engine in running a sawmill, and, while so using it, they, as a matter of precaution, inserted an inner screen under the spark arrester, composed of fine wire netting. This fine inner netting was resupplied to the engine from time to time, and had been thus replaced two or three times prior to the date of the fire in question. It is not customary, however, to use this fine netting. The evidence failed to show that it had ever been used in this manner by any one other than the defendants.

On the day the fire occurred, and after the fire, an examination of the engine disclosed that there was a hole in the fine under netting, but none was seen in the spark arrester itself, and it was not deficient.

Defendants examined the spark arrester and the fine wire screen under it a day and a half before the fire occurred, and at that time there was no hole in either of them.

No evidence was introduced showing that the engine

Martin v. McCrary.

in question emitted sparks more copiously "than was natural for any engine of similar kind and character."

When the fire occurred the engine was running with the damper slightly up, but it was necessary to give it some draft to enable it to run at all.

Defendant Peoples was with the engine at the time of the fire, but neither he nor any of his employees or servants had knowledge of the hole in the fine netting at the time.

His honor added the following general findings upon the subject of negligence, viz :

"Defendants had not been negligent in their duty to observe defects in the engine. . . .

"Defendants were not negligent in the operation of the engine in question, and the accident complained of was not the result of the negligence of the defendants, either directly or through their servants."

YOUNG & YOUNG, for Martin *et al.*

MCCROSKEY & PEACE, for McCrary *et al.*

MR. JUSTICE NEIL, after making the foregoing statement, delivered the opinion of the court.

The degree of care required by one threshing wheat with a steam thresher, in respect of setting fires, is the same as that devolved upon railway companies in the use of their engines. That rule, as laid down in *Railroad v. Fort*, 112 Tenn., 432, 80 S. W., 429, is that "care com-

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mensurate with the risk or hazard" must be used. In the same opinion the degree of care required is thus characterized. "A degree of care and prudence commensurate with the danger to which property is exposed by them in the lawful conduct of their business." In the same case it is further said: "They are authorized to carry fire on them [the engines] for the purpose of generating steam, and when they have them properly constructed and equipped with spark arresters and appliances of the latest and most approved character to prevent the escape of coals and cinders, in good repair, carefully and skillfully handled, and observe such other precautions as the surroundings may call for to avoid the communication and spread of fire, they are not liable for property unavoidably destroyed by escaping sparks and cinders." Again it is said: "As the danger necessarily attending the use of fire in locomotives is far greater in some places and upon some occasions than upon others, what is reasonable care in their equipment and management must always depend upon the facts and circumstances of each case. What would be ordinary care in the operation of them in the country, or in a wet season, might be gross negligence in a town or city, or in a drought, when and where the danger of communicating the fire is in the very nature of things much greater."

The burden of proof is upon the defendant in such cases to show that he, or it, as the case may be, has complied with all the requirements of the rule, since a presumption of negligence arises upon evidence introduced

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that a fire has been set by sparks escaping from an engine. *Id.* And what would or would not be ordinary care, under all of the circumstances proven in a given case, is always a question for the jury, or for the court when it sits without the intervention of a jury. *Id.*

Applying these principles to the present case, we are of the opinion that the defendants were liable for the injury done. It was not sufficient for them to show merely that the spark arrester in question was of the kind generally in use, and that the engine did not emit sparks any more copiously "than was natural for any engine of similar kind and construction." Operating, as they were bound to do, in the midst of dry and combustible material like wheat straw, they should have shown that their engine was, in respect of fire precautions, up to the state of the art at the time the fire occurred. Indeed, the defendants by their conduct clearly showed that they did not regard the spark arrester with which the engine was equipped as containing meshes sufficiently fine and close to enable them to work with reasonable safety in the midst of combustible material, since, when they used the engine in running a sawmill, in the midst, of course, of material easily ignited, like sawdust (and straw is even more combustible), they found it necessary to place a fine wire screen under the spark arrester, and to continue to renew this fine netting from time to time as it would wear out. That this netting was in fact necessary, when using the engine for such a purpose, is shown by the fact that sparks escaped

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and set fire to the wheat straw because of the hole in the surface of that netting referred to in the statement.

Treating the engine as properly equipped for the purpose to which it was put, by the combined use of the spark arrester and the under netting, the defendants were negligent in failing to make at least a daily inspection of the equipment referred to. It was not sufficient for the defendants to show that neither they nor their servants had knowledge of the hole in the netting. They had the means of knowledge, and should have used those means.

The two general findings quoted at the close of the statement must be held findings of law, and as such they were incorrect, being, as we conceive, improper applications of the law to the special facts found.

It results that the judgment of the court below must be reversed, and judgment must be rendered here for the plaintiffs for the amount of the damages assessed, with interest and costs.

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KNOXVILLE TRACTION COMPANY v. J. C. BROWN *et ux.*

(*Knoxville*. September Term, 1905.)

1. **CONTRIBUTORY NEGLIGENCE.** Question for jury where there may be a difference of opinion, and peremptory instructions to return a particular verdict should not be given, when. Where, in an action against a street railway company for injuries received by the plaintiff in a collision with a street car, there may be a difference of opinion under the evidence as to whether the plaintiff's negligence directly contributed to cause the accident, the court should not peremptorily instruct the jury to return a verdict in favor of the defendant, but should, under proper instructions, submit to the jury the question of the plaintiff's contributory negligence. (*Post*, pp. 328-333.)

Cases cited and approved: *Traction Co. v. Carroll*, 113 Tenn., 514; *Tyrus v. Railroad*, 114 Tenn., 579; *Railroad v. Ives*, 144 U. S., 417; *District of Columbia v. Moulton*, 182 U. S., 577; *Warner v. Railroad*, 168 U. S., 339; *Creamer v. Railroad*, 156 Mass., 320; *Doty v. Railroad*, 129 Mich., 464; *Greengard v. Railroad*, 72 Minn., 181; *McCarthy v. Railroad*, 120 Mich., 400; *Railroad v. Block*, 55 N. J. Law, 605; *Blaney v. Traction Co.*, 184 Pa., 524; *Bethel v. Railroad*, 8 O. C. D., 310; *Traction Co. v. Helms*, 84 Md., 515.

2. **NEGLIGENCE.** Of defendant to be submitted to the jury where there may be a difference of opinion, and peremptory instructions to return a particular verdict not to be given, when.

Where, in an action against a street railway company for injuries received by the plaintiff in a collision with a street car, there may be a difference of opinion under the evidence as to whether the defendant's negligence caused the accident, the court should not peremptorily instruct the jury to return a verdict in favor of the defendant, but should, under proper instructions, submit to the jury the question of the defendant's negligence. (*Post*, pp. 328-333.)

See cases cited under the first headnote.

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3. PRACTICE. Controverted and determinative questions to be submitted to the jury.

Where there are controverted and determinative questions of fact, the issues must be submitted to the jury. (*Post*, pp. 329-331, 333.)

Cases cited and approved: *Traction Co. v. Carroll*, 113 Tenn., 514; *Tyrus v. Railroad*, 114 Tenn., 579.

4. EVIDENCE. Material evidence defined.

By material evidence is meant evidence material to the question in controversy, which must necessarily enter into the consideration of the controversy and by itself, or in connection with other evidence, be determinative of the case. (*Post*, pp. 329, 331, 332.)

5. SAME. Amended city ordinance is receivable in evidence without the original, if no objection is made, when.

In an action against a street railway company for injuries received by plaintiff in a collision with a street car, there is no reversible error in receiving in evidence and considering an amended city ordinance fixing the maximum speed of street cars, where it is introduced and read without objection, though it would have been more formal to have introduced the original ordinance. (*Post*, pp. 333, 334.)

6. STREET RAILWAYS. Duty to look before attempting to cross; and failure to do so defeats recovery for injuries.

Where the plaintiff attempting to cross the street, started diagonally across the street, but before reaching the first street car track, he was intercepted by a wagon, and as he passed behind it and was about to enter on the second track, a car struck him before he could cross the track, it is error for the court to refuse to charge, in an action for such injury, that it was the plaintiff's duty not only to look before attempting to cross the track, but also after he had been intercepted by the wagon, and if his failure so to look after he passed the wagon was the direct and proximate cause of his injury, the verdict should be in favor of the defendant. (*Post*, pp. 324-328, 334, 335.)

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- 7. CONTRIBUTORY NEGLIGENCE.** Directly and proximately concurring with defendant's negligence in causing injury defeats recovery.

Where the plaintiff's negligence concurred directly and proximately with the negligence of the defendant in causing the injury, there can be no recovery against the defendant. (*Post*, pp. 328, 334, 335.)

- 8. STREET RAILWAYS.** Care and caution to be used in crossing under perilous conditions.

A person attempting to cross street car tracks under perilous conditions, in which he had voluntarily placed himself, must use such reasonable care, caution, and diligence as would be necessary to prevent an accident; and the care and caution to be used upon an ordinary occasion in crossing would not meet the requirements of such perilous conditions. (*Post*, pp. 334, 335.)

FROM KNOX.

Appeal from the Circuit Court of Knox County.—JOSEPH W. SNEED, Judge.

SHIELDS, CATES & MOUNTCASTLE, for Traction Co.

SANSOM & WELCKER and E. F. MYNATT, for Brown.

MR. JUSTICE WILKES delivered the opinion of the Court.

This is an action for damages for personal injuries inflicted upon Mrs. M. J. Brown, wife of J. C. Brown. The

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suit is brought in the name of the husband and wife, and is based upon an injury done to the wife.

There was a motion for peremptory instructions in favor of the defendant at the conclusion of the plaintiff's testimony, and also at the conclusion of all the evidence, to return a verdict in favor of the defendant. These motions were overruled by the court, and there was a trial before the judge and a jury, and a verdict and judgment in favor of the plaintiff for \$2,000, and the defendant company has appealed.

The first contention made is that there is no material evidence to support the verdict, and, if there may be some proof of negligence on the part of the company, still there is evidence of contributory negligence on the part of the plaintiff, which directly contributed to cause the injury, and must bar any recovery, and hence that the court was in error in not granting peremptory instructions to the jury to award a verdict in favor of the plaintiff.

The two vital questions in this case are: First whether there was any negligence on the part of the motorman of the street car company which caused the accident; and, second, whether there was any negligence on the part of the plaintiff Mrs. Brown which directly contributed to cause the accident.

The facts in the case are that the plaintiff Mrs. Brown was attempting to cross Gay street, in Knoxville, from the west to the east side. The street has a double track upon it, and cars pass in each direction quite frequently.

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Those going north pass on the eastern track, and those going south on the western track, and the two lines of track are near each other.

The plaintiff, when she attempted to cross the street, looked in both directions, and saw that cars were coming from both the north and south. She believed, however, that she had time to cross over the tracks before the cars would reach the point where she was crossing. She started across the street diagonally in a northerly direction, and before she reached the west track she was intercepted by a coal or furniture wagon, which checked her and caused her to vary her course up the street at a sharper angle in order to pass behind it. The wagon was going in a southerly direction, and as she passed behind it, and was about to enter upon the east track, the car coming on that track from the south made its appearance very near her. She was from five to fifteen feet in front of the car when she was discovered by the motorman and when she discovered the near approach of the car. The motorman attempted to stop the car, but was unable to do so. He cried to her, "Look out, lady!" and she made a leap and got nearly across the east track, when the corner of the car struck her, turning her around, and throwing her to the pavement.

While the testimony is that she looked in both directions before going on the street and saw the car coming from the south which caused the injury, there is no testimony to show that, after crossing the west track and being checked and deflected in her course by the wagon,

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she looked again south for the approach of the car from that direction before entering upon the eastern track.

We think there is testimony in the record to show that the motorman on the car which caused the accident was immediately before the accident, and perhaps at the time of it, looking at the wagon or its driver, under the impression that there was danger of striking the wagon, and that he was not at the time of passing the wagon looking along the track to see whether any one was upon it or not.

We think the evidence shows that she was attempting to cross the track under dangerous and critical circumstances; and, if so, it was her duty to watch very closely for the movement of the cars, which she knew were coming in both directions, and more especially as she was checked in her progress by the intervening wagon.

We think that under the evidence there might have been a difference of opinion as to whether the motorman was guilty of negligence in watching the wagon, instead of the track ahead of him, and also that there might have been a difference of opinion as to whether the lady should not, under the circumstances, being checked in her passage, have stopped before entering upon the east track to see whether she could cross that track before the car which she had seen coming would reach her.

These questions of negligence upon the part of the motorman and contributory negligence upon the part of the plaintiff should have been left to the jury, under

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proper instructions; and it was not, therefore, a case for peremptory instructions.

A motion for peremptory instructions is not one which addresses itself to the discretion of the court, but one which presents a question of law; and the crucial question in the case is whether there is any determinative evidence upon which the jury must base a verdict in favor of the party who produces it.

It is said in the case of *Grand Trunk Railroad Company v. Ives*, 144 U. S., 417, 12 Sup. Ct., 679, 36 L. Ed., 485, that the terms "ordinary care" and "reasonable prudence" and such like terms, as applied to the conduct and affairs of men, have a relative significance, and cannot be arbitrarily defined. What may be deemed ordinary care in one case may, under different surroundings and circumstances, be gross negligence. The policy of the law has relegated the determination of such questions to the jury under proper instructions from the court. It is their province to note the special circumstances and surroundings of each particular case, and say whether the conduct of the parties in that case is such as would be expected of reasonably prudent men under a similar state of affairs. When a given state of facts is such as reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury. It is only where the facts are such that all reasonable men must draw the same conclusions from them that the

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question of negligence is ever considered one of law for the court.

To support this proposition, a large number of cases are cited.

Substantially the same rule is laid down in *District of Columbia v. Moulton*, 182 U. S., 577, 21 Sup. Ct., 840, 45 L. Ed., 1237, in these words: "The question of negligence or no negligence is one of law for the court, where but one inference can reasonably be drawn from the evidence.

This case approves also the language in the case of *Warner v. B. & O. Ry. Co.*, 168 U. S., 339, 18 Sup. Ct., 68, 42 L. Ed., 491, as follows: "It is only where the evidence is such that reasonable men may fairly differ as to the deductions to be drawn therefrom that the determination of the fact of negligence should be left to the jury."

In *Traction Co. v. Carroll*, 113 Tenn., 514, 82 S. W., 313, it is said: "The rule is that any act must be held negligence in law, or negligence as matter of law, where no reasonable difference of opinion can exist among men as to the negligent character of the act."

The rule as laid down in the case of *Tyrus v. Railroad Co.*, 114 Tenn., 579, 86 S. W., 1074, is substantially: "When there is no controversy as to any material fact, there is nothing for the jury to find, and the question is then solely one of law for the court; and in such a case the court may instruct the jury to return a verdict in accordance with his view of the law applicable to such as-

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certained or uncontroverted facts. There can be no constitutional exercise of the power to direct a verdict in any case in which there is a dispute as to any material evidence or any legal doubt as to the conclusion to be drawn from the whole evidence upon the issues to be tried."

And again: "If there is any dispute as to any material fact, the case must go to the jury; if there is no dispute as to fact, the question is one of law for the court."

By material evidence is meant evidence material to the question in controversy, which must necessarily enter into the consideration of the controversy and by itself, or in connection with the other evidence, be determinative of the case.

But a conflict of the evidence upon a detached or separate feature or fact, even though it is material, should not of itself prevent the giving of peremptory instructions. Facts are frequently material which are by no means determinative; and facts are frequently material in themselves, but become immaterial when taken in connection with other facts.

To illustrate: We take the common case of a person injured in a railroad accident. It may be a disputed and controverted fact which one of two roads did the injury, and it is therefore a material question to determine which one did it. But it may further develop that, no matter which road it was, there was gross contributory negligence which proximately caused the injury, and the

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injured party could not, therefore, recover in any event. In such case, the court should give peremptory instructions against the plaintiff notwithstanding the conflict of evidence as to who caused the injury or whether the road was itself guilty of negligence. Other illustrations could easily be given.

So that the disputed fact must not only be material, but in itself or in connection with other facts it must be determinative of the real issue and the merits of the case.

As bearing upon the question of the plaintiff's contributory negligence, it has been held that it is the duty of a pedestrian, alighting from one car on one track, to look and listen before crossing an adjoining track. *Creamer v. West End R. R. Co.*, 156 Mass., 320, 31 N. E., 391, 16 L. R. A., 490, 32 Am. St. Rep., 456; *Doty v. R. R. Co.*, 129 Mich., 464, 88 N. W., 1059; *Greengard v. St. Paul R. R. Co.*, 72 Minn., 181, 75 N. W., 221.

And the rule applies to one who crosses behind a car onto another track. *McCarthy v. R. R. Co.*, 120 Mich., 400, 79 N. W., 631; *Newark R. R. Co. v. Block*, 55 N. J. Law, 605, 27 Atl., 1067, 22 L. R. A., 374; *Blaney v. Traction Company*, 184 Pa., 524, 29 Atl., 294.

And also to a pedestrian passing behind a wagon moving along one track to cross another track running parallel. *Bethel v. Street Ry. Co.*, 8 O. C. D., 310.

In the case of *Newark v. Block*, *supra*, it was held that, where obstacles temporarily intervene to prevent observation, it is the duty of the pedestrian to delay

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crossing the track until proper observation can be made.

See, further, *Baltimore Traction Co. v. Helms*, 84 Md., 515, 36 Atl., 119, 36 L. R. A., 215.

As before stated, we consider the question of the negligence of the motorman in looking at the passing wagon, instead of at the track in front of him, and the question of the negligence of the plaintiff in passing around the wagon and going upon the track without looking, as determinative and controverted questions in this case, and they ought to have been left to the jury.

It is objected that an ordinance of the city of Knoxville, which was introduced in evidence, was improperly considered by the court as fixing the rate of street cars at a maximum of eight miles an hour.

It appears from the charge of the court that this ordinance was introduced without objection; but the point made is that it is only an amendment to another ordinance, the original not being put in evidence, and the contention is that it does not of itself show that it was an ordinance regulating the speed of street cars.

The bill of exceptions shows the introduction of this amended ordinance to have been done in this manner: "Counsel for plaintiff here introduced certified copy of city ordinance regulating the speed of street cars, which is as follows." Then follows the amended ordinance, and it appears to have been introduced and read without objection.

We think that, while it may have been more formal to have introduced the original ordinance, still the bill of

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exceptions leaves no doubt that this amended ordinance was intended to and did regulate the speed of street cars within the city.

There is therefore no reversible error in the construction of this ordinance by the trial judge and his instruction to the jury in relation thereto.

The next assignment of error is that the court improperly refused a request, tendered by the defendant, to the effect that it was the duty of the plaintiff to not only look before she attempted to cross the track, but also after she had been intercepted by the wagon, and, if her failure to so look after she passed the wagon was the direct and proximate cause of her injury, the verdict should be in favor of the company.

The fourth assignment is in regard to a refusal to grant a special request to the effect that, if the company was negligent and the plaintiff was also negligent in not looking or listening, and if such negligence on her part concurred directly and proximately with the negligence of the defendant in causing the injury, the verdict should be in favor of the company.

We think that under the facts of the case these requests ought to have been granted, and that they are not covered sufficiently by the general charge.

It is true, the trial judge does charge that it was the duty of Mrs. Brown, in attempting to cross the street car track between crossings, to look for an approaching car, and to exercise ordinary care and caution for her own safety; and "if you believe in this case that Mrs.

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Brown failed to do that, and you should believe that her negligence was in any sense the prime, proximate, and efficient cause of her injury, then there could be no recovery."

While the charge is correct as it applies to an ordinary attempt to cross a street car track, still Mrs. Brown was not attempting to cross the tracks under ordinary circumstances, but was attempting to cross the track under perilous conditions, with cars coming in each direction and a wagon intervening to cut off her sight and retard her progress.

Under such circumstances, it was incumbent on her to use such care, caution, and diligence as would be necessary, reasonably, to prevent an accident; and the care and caution which she would use upon an ordinary occasion in crossing would not meet the requirements of the perilous condition in which she voluntarily placed herself.

We think, therefore, that the charges should have been more explicit, and in terms more directly applicable to the facts of the case, and that the jury should have been instructed that Mrs. Brown should exercise reasonable care and caution in view of her perilous surroundings.

For these reasons, and upon these grounds, we are constrained to reverse the judgment of the court below and remand the cause for a new trial.

Appellee will pay the costs of appeal.

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THE STATE, *ex rel.* LITTLE, v. SLAGLE.

(*Knoxville.* September Term, 1905.)

1. **OFFICER.** A deputy sheriff is an officer.

A general deputy of a sheriff, as distinguished from a special deputy assigned to a particular case or transaction, is an officer within the meaning of the constitution and statutes of this State.

Constitution cited and construed: Art. 2, sec. 26.

Code cited and construed: Secs. 445, 448, 1073, 1079, 1080, 1081 (S.).

Cases cited and approved: *Reves v. State*, 11 Lea, 124; *State, ex rel., v. Bus (Mo.)*, 36 S. W., 639, 33 L. R. A., 616.

2. **SAME.** The office of deputy sheriff is a lucrative one.

The office of deputy sheriff, whether entitled to compensation fixed by contract between the sheriff and the deputy, or entitled to the fees allowed by law, is a lucrative office, within the constitutional provision declaring that no person shall hold more than one lucrative office at the same time.

Constitution cited and construed: Art. 2, sec. 26.

3. **SAME.** Acceptance by, of another office, vacates one then held. Case in judgment.

It is well settled that an officer's acceptance of another office incompatible with one then held by him, is, *ipso facto*, a vacation of the office first held, without judicial proceedings of any kind; therefore, where a constable accepts an appointment to the office of deputy sheriff, the office of constable becomes, *ipso facto*, vacant, and the county court may summarily declare the office of constable vacant, and make an appointment to fill the vacancy.

Constitution cited and construed: Art. 2, sec. 26.

Cases cited and approved: *State, ex rel., v. Grace*, 113 Tenn., 9; *Calloway v. Sturm*, 1 Heisk., 764.

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FROM KNOX.

Appeal from Chancery Court of Knox County.—
JOSEPH W. SNEED, Chancellor.

E. F. MYNATT and J. C. FORD, for Little.

JOHN W. GREEN, for Slagle.

MR. JUSTICE NEIL delivered the opinion of the Court.

The facts out of which the present controversy arose are as follows:

At the August election, 1904, Daniel W. Little was elected one of the constables for the Fourth district of Knox county, and duly qualified and entered upon his duties as such. In December, 1904, the sheriff of Knox county appointed Mr. Little one of his regular deputies, to serve process in the portion of the county in which the latter resided, being a section of the county remote from Knoxville. Mr. Little accepted the appointment and entered upon the discharge of the duties assigned him. Thereupon, at the January term, 1905, the county court of Knox county, without citation or notice to Mr. Little and without a trial summarily declared the office of constable, to which Mr. Little had been elected, vacant, and

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appointed the present defendant, William Slagle, to fill the vacancy. Mr. Slagle accepted the appointment and entered upon the discharge of its duties at once. Thereupon the present bill was filed, in the nature of a proceeding in *quo warranto*, to test the right of Mr. Slagle to hold the office. The chancellor dismissed the bill on demurrer.

The first question to be determined is whether the same person can hold the office of constable and that of deputy sheriff at the same time without violating article 2, section 26, of the constitution of 1870, which declares that no person in this State shall hold "more than one lucrative office at the same time."

Is a deputy sheriff an officer, in the legal sense of that term? and, if so, is the office he holds a lucrative one in the constitutional sense?

Under our statutes (Shannon's Code, section 448) the sheriff of a county may appoint as many regular and special deputies as he may see proper. It is to be deduced from the section of the Code referred to and from our decisions upon the subject that the sheriff may appoint his deputies for such length of time, within his own term, as he may desire, and the compensation for his services may be arranged by contract between the sheriff and his deputy; that process does not run to the deputy, but to the sheriff, yet the deputy may execute any process so directed that comes to his hands, and he has all of the powers of the sheriff himself in respect thereof, yet if he be guilty of any default, the recourse of the injured

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party is not upon him, but upon the sheriff, and the latter may look to the deputy for reimbursement. *Glasgow's Lessee v. Smith*, 1 Tenn., 144, 152-155; *Rose v. Lane*, 3 Humph., 218-220; *Vance v. Campbell*, 8 Humph., 527; *Robertson v. Lessan*, 7 Cold., 160; *Reves v. State*, 11 Lea, 124. In the first of these cases it was said, *arguendo*, that the deputy was not an officer; in the last, it was held that he was an officer, in the sense of Code 1858, section 4750 (Shannon's Code, section 6634), which allowed \$50 to every officer prosecuting to conviction a certain class of offenders. In *Robertson v. Glenn*, 3 Baxt., 164, the right of a constable to accept a special deputation from the sheriff and to act thereunder was recognized; and in *Lewis v. Nashville*, 101 Tenn., 659, 49 S. W., 749, the right of a regular policeman of a city to hold the position of deputy sheriff was recognized, but in that case he has denied the right to compensation or fees as deputy sheriff, on special grounds appearing therein that do not affect the general question. In the constitution (article 10, section 1) it is provided that "every person who is chosen or appointed to any office or trust or profit shall, before entering upon the duties thereof, take an oath to support the constitution of this State and of the United States, and an oath of office." Sections 1073 and 1081 and 445 of Shannon's Code set out the contents of the oath of office referred to in the constitution. Section 1079 reads: "Whenever any officer is authorized or required to appoint a deputy, such deputy, before he proceeds to act, shall take the constitu-

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tional oaths and oath of office, which shall be accompanied by the same certificate, filed in the same office, and with the same indorsement, as the oaths of his principal; but the provisions of this section do not apply to any deputy who may be employed in particular cases only." Section 1080 reads: "If any officer or deputy required by law to take and file such oaths, enter upon the duties of his office without first taking and filing the same as presented, he is guilty of a misdemeanor."

Notwithstanding the peculiarities of a deputyship under the high sheriff of a county, we think it quite clear from the last two sections of the Code which we have quoted, as well as from the case of *Reves v. State*, supra, that a general deputy, as distinguished from a special deputy assigned to a special case or transaction, is an officer in the sense of the law. Although he is appointed by the high sheriff, and holds to him the peculiar relations already mentioned, yet his rights and powers are derived from the law, and his duties are those of an officer of the law. It was so held in *State, ex rel., v. Bus (Mo.)*, 36 S. W., 639, 33 L. R. A., 616.

Is the office of deputy sheriff a lucrative one? A lucrative office is one whose pay is affixed to the performance of its duties (*State v. Kirk*, 44 Ind., 401, 15 Am. Rep., 239); and, when the duties of the office are fixed by statute, it is immaterial that the compensation of the officer is fixed by some other board or officer (*Chambers v. State* [Ind. Sup.], 26 N. E., 893, 11 L. R. A., 613). In the case of a deputy sheriff in this State, if there be

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no contract between him and the high sheriff as to compensation, he is entitled to the same fees that the high sheriff himself receives for the same kind of service; if there be a contract between the two as to compensation, then for such compensation as the contract may fix; but in either event the office is equally a lucrative one within the intent and meaning of the constitution.

Was it necessary that Mr. Little should have been cited before the county court, after he had accepted the office of deputy sheriff, before his office of constable could be legally declared vacant and a successor appointed?

The rule at common law is that, where one accepts a second office incompatible with one already held by him, the office first held is thereby *ipso facto* terminated without judicial proceedings of any kind (*State v. Grace*, 113 Tenn., 9, 18, 82 S. W., 485; *State, ex rel., v. Bus*, supra, and authorities cited); and the same rule obtains where the incompatibility arises from an inhibitory provision in a constitution against holding two offices (*Id.*). And see *Calloway v. Sturm*, 1 Heisk., 765; also, *Foltz v. Kerlin*, 105 Ind., 224, 4 N. E., 439, 5 N. E., 672, 55 Am. Rep., 197; *Kerr v. Jones*, 19 Ind., 351; *State v. Brinkerhoff*, 66 Tex., 45, 17 S. W., 109; cases cited in note to *Attorney-General v. Marston* (N. H.), 13 L. R. A., 670.

Of course, we are not dealing here with such rights as third persons may have acquired under such acts as Mr. Little may have performed as constable *de facto* after his acceptance of the office of deputy sheriff. *Oliver v. Jer-*

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sey City (N. J. Err. & App.), 44 Atl., 709, 48 L. R. A., 412, 76 Am. St. Rep., 228.

There was no error in the action of the court below in sustaining the demurrer to the bill, and the decree is affirmed, with costs.

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PRESTON v. THE STATE.

(Knowville. September Term, 1905.)

1. **OATH OF TALESMEN.** Objection to, cannot be made for the first time in supreme court.

Objection to the manner in which the talesmen were sworn cannot be made for the first time in the supreme court, where none was made at the time the oath was administered and there was no motion to require the jurors to be resworn and re-examined.

2. **SAME.** Not invalid for mere informalities.

While it is the duty of an officer administering an oath to follow the forms prescribed by law, yet mere formalities are not essential to the validity of the oath administered to talesmen, and if there is substantial compliance with the statute, it is sufficient.

Case cited and approved: Sharp v. Wilhite, 2 Humph., 434.

FROM JOHNSON.

Appeal in error from the Circuit Court of Johnson County.—ALONZO J. TYLER, Judge.

DONNELLY, BUTLER & DONNELLY, for Preston.

ATTORNEY-GENERAL CATES, for the State.

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MR. JUSTICE SHIELDS delivered the opinion of the Court.

Plaintiff in error was indicted upon a charge of murder in the first degree in the circuit court of Johnson county, tried, convicted of that crime, and sentenced to be hanged, and now prosecutes an appeal in the nature of a writ of error to this court.

The chief assignment of error relied upon to reverse this judgment is the failure of the clerk to comply with all the formalities prescribed by statute in administering the oath to the talesman presented before examining them touching their qualifications as jurors. It appears from the record that the talesmen were sworn upon the Evangelists, by requiring them to kiss the Book. No objection was made to this omission at the time, but after twelve jurors had been elected and accepted without the exhaustion of the peremptory challenges the plaintiff in error moved to discharge the entire panel because of the failure of the clerk to require them to kiss the Book. This motion was overruled, the jury sworn, and the case proceeded with, with the result stated.

There was no objection at the time to the manner in which the oath was administered, and there was no motion to require the persons selected as jurors to be re-sworn and re-examined, and therefore, the record is not in a condition for the plaintiff in error to complain of it. But there is no merit in the contention. While in

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such matters it is the duty of the officers to follow the forms prescribed by law, and they should always do so, yet mere formalities are not, in cases of this kind, essential to the validity of the act, and, if there is a substantial compliance with the statute, the oath is obligatory and binding, which is all that is required. This seems to be well settled.

In *Sharp v. Wilhite*, 2 Humph., 434, it is said that an oath administered substantially according to the prescribed form, will be valid, and, if taken falsely, the party will be guilty of perjury.

Mr. Wharton, in his work on Criminal Law (section 1251), says: "The fact that a person takes an oath in any particular form is a binding admission that he regards it as binding on his conscience, and a mere formal variation from the form of the statutory oath does not affect its obligatory character."

Mr. Bishop, in defining a corporal oath, says that it is so called because he toucheth with his hand some part of the Holy Scripture; and, further, that the form of administering an oath is not in law essential, and, even if a statute prescribes the uplifting of the hand, it will be good by laying the hand on the Gospels, because the statutory provision is simply directory. Bishop's New Criminal Law, section 1018.

In *People v. Cook*, 8 N. Y., 67, 59 Am. Dec., 451, it is said: "If a witness in taking the oath, by accident kisses a book not the Gospels, neither he nor the administering tribunal being aware of the mistake, the oath is still

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binding." And in *Rea v. Haly*, 1 Crawl. & Dix, C. C., 199, it was held that "kissing the Book is not the essence of the oath and an indictment for administering an unlawful oath may be sustained where the Book was not kissed."

The facts fully sustain the verdict of the jury, and the judgment must be affirmed.

Slover v. Union Bank.

SLOVER v. UNION BANK.

*(Knowville. September Term, 1905.)***1. USURY. When statute of limitations begins to run.**

When there is a series of usurious transactions between parties, the statute of limitations does not begin to run against a claim for usury until the transactions are closed.

2. STATUTES. May change, but cannot destroy, remedy.

A statute may be lawfully enacted that will alter an existing remedy, but the legislature has no power to cut off all remedy upon an existing cause of action, or bar the suit without giving a reasonable time to prosecute.

3. SAME. Act limiting suit for usury to two years construed.

Chapter 439, Acts 1903, provides that "no action shall be brought on any claim for usury after two years from the date of the payment of the debt upon which such claim for usury shall be based; provided, this act shall not affect any litigation now pending."

Held:

(1) The provision in the act that it shall not affect any litigation now pending, is entirely nugatory, since the legislature could not interfere with the rights of the claimant after suit commenced.

(2) The act will be given a prospective, and not a retrospective, effect, and rights of action which had accrued before the passage of the act are not cut off or affected by its operation.

Act cited and construed: 1903, ch. 439.

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FROM ANDERSON.

Appeal from Chancery Court, Anderson County.—
HUGH G. KYLE, Chancellor.

D. K. YOUNG and C. J. SAWYER, for Bank.

J. H. WALLACE and CORNICK, WRIGHT & FRANTZ, for
Slover.

MR. JUSTICE WILKES delivered the opinion of the
Court.

This cause is before us upon a decree of the chancellor overruling a demurrer and granting an appeal to the defendant.

The bill was filed to collect usury upon a series of transactions on the 20th of March 1905. It charges that the last usurious interest was paid on the 1st of March, 1901, and that there was a final settlement between the parties on the 4th of March, 1902, of all the transactions between them involving the usury.

There was a demurrer filed, relying upon the statute of two years and the statute of six years; and it is insisted in this court that the demurrer should have been sustained on the ground that the action was barred by the statute of two years.

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There being a series of usurious transactions, the statute of limitations would not begin to run until these transactions were closed; and a settlement was made between the parties on the 4th of March, 1902. On the 15th of April, 1903, the legislature of Tennessee passed an act in the following words, to wit:

"No action shall be brought on any claim for usury after two years from the date of the payment of the debt upon which such claim for usury shall be based; provided this act shall not affect any litigation now pending." Shannon's Code Supp., p. 692.

It is insisted that under this statute all rights of action for usury paid, which had accrued more than two years before the passage of the act and upon which no suit had been brought at the time the act was passed, were barred and that the expression of reservation used in the statute "Provided this act, shall not affect any litigation now pending," was intended to preserve all rights of action upon which suit had been brought before the act was passed, but none other, and that all other rights of action which had accrued more than two years before April 15, 1903, should be cut off at once, and extinguished. In other words, if the right of action had accrued under the previously existing laws on the 15th day of April, 1901, it should be at once summarily cut off and extinguished; and in this connection it is said that the statute of limitations is not a vested right, but is a remedy, and that the legislature has the right to change and limit such remedy as it might see proper.

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It is said by Mr. Bishop, in his work on Written Laws, p. 73:

"The legislature can, at its pleasure, change a remedy, but not to the denial of all remedy, or even to such a reduction of it as would leave any essential part of the right practically unavailable."

Cooley, in his work on Constitutional Law, p. 340, says:

"A statute of limitation takes away no right of property. Such a statute prescribes a reasonable time within which a party claiming legal rights, which another withholds, shall commence legal proceedings for their enforcement; but all limitation acts must allow to claimants a reasonable opportunity to assert their rights in court, and one entirely and manifestly unreasonable in the time it gives is void."

In Am. & Eng. Ency. Law (2d Ed.), p. 952, it is said:

"The legislature has no power, however, to cut off the remedy or bar the suit upon an existing cause of action *instantly*, or without giving a reasonable time to prosecute."

In order to sustain the validity and constitutionality of this act, we are compelled to give it a prospective, instead of a retrospective, effect. In other words, if the right of action had accrued to any party before the passage of the act to recover for the usury paid, such right would not be affected afterward by the passage of the act, even though the suit had not been brought before its passage.

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The provision in the act that it shall not affect any litigation now pending is entirely nugatory and of no effect, since the legislature could not interfere with the rights of the claimant after suit commenced.

Striking out this provision, therefore, we have an act which changes the statute from six years to two years, without mentioning rights of action which had already accrued.

We think, therefore, that the legislature must have meant to give the act a prospective, and not a retrospective, effect, and that rights of action which had accrued before the passage of the act were not cut off or affected by its operation, inasmuch as no time was given for the enforcement of such rights.

The chancellor was therefore correct in overruling the demurrer and requiring the case to proceed to trial upon its merits.

There are other grounds of demurrer which we think not well taken; but, as they are not pressed in this court, we do not consider them further.

The decree of the court below is affirmed, the cause is remanded for further proceedings, and the appellant will pay the costs of appeal.

Alfsen v. Crouch.

ALFSEN v. CROUCH et al.*(Knoxville. September Term, 1905.)***1. MUTUAL BENEFIT SOCIETIES. Effect of surrender of certificate.**

Where a certificate in a mutual benefit society was surrendered by the insured in his lifetime and another certificate issued in favor of a different beneficiary, the original certificate became *functus officio*.

2. SAME. Waiver of by-laws.

A provision in the constitution or by-laws of a mutual benefit society, limiting the persons who may be made beneficiaries in certificates issued by it, may be waived by the society.

Cases cited and approved: *Manley v. Manley*, 107 Tenn., 189; *Johnson v. Knights of Honor*, 53 Ark., 256; *Knights of Honor v. Watson*, 64 N. H., 518.

3. SAME. Beneficiary in policy has no vested interest therein.

The beneficiary in policy of insurance issued by a mutual benefit society has no vested interest therein as against the insured, and has no right to assail a change of beneficiaries on any alleged ground of fraud or because the second beneficiary was not of a class named in the code of the order, and, *a fortiori*, cannot recover from the second beneficiary the proceeds of a policy voluntarily paid by the society.

Cases cited and approved: *Hoelt v. Knights of Honor*, 113 Cal., 91; *Brown v. Grand Lodge*, 80 Iowa, 287; *Smith v. Pinch*, 80 Mich., 335.

Alfsen v. Crouch.

FROM HAMILTON.

Appeal from Chancery Court of Hamilton County.—
T. M. McCONNELL, Chancellor.

SCOTT & YARNELL and SAM H. SEYMOUR, for Alfsen.

BROWN & SPURLOCK, for Crouch.

MR. JUSTICE WILKES delivered the opinion of the Court.

This is a suit by the complainant to recover from the defendant Catherine Crouch \$2,000, the amount of an insurance policy issued by the Woodmen of the World, a fraternal order, to Mrs. Catherine Crouch upon the life of Alf Alfsen.

It appears that Alfsen was a native of Norway, who went to sea when he was about twelve years old, and after wandering from place to place for some time he came to the house of Mrs. Crouch, on Mission Ridge, near Chattanooga, and lived with her as a florist and gardener for something like three years. He was a man afflicted with an offensive disease, but is described as bright, pleasant, and interesting. He was able to do but little, if any, work and was supported and taken care of by Mrs. Crouch. He had, taken out a policy of insurance

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in the Woodmen of the World at Mobile, Ala., for \$2,000. This was payable to his father, Ule Alfsen. Several months before his death he surrendered this certificate, in which his father was named as beneficiary, and procured the issuance of a new certificate in favor of Mrs. Crouch, and after his death the amount of insurance called for by this latter certificate was paid to Mrs. Crouch.

The theory of the bill is that this fund was a trust fund, that the surrender of the first certificate and the issuance of the second certificate was procured by fraud, and that Mrs. Crouch had no insurable interest in the life of the deceased.

It appears that he had become indebted to Mrs. Crouch in a considerable sum for his maintenance during the three years, and was anxious to pay her and remunerate her for her kindness. In order to comply with the rules of the order, Alfsen was adopted by Mrs. Crouch as her son. This was done under legal advice, and the matter was submitted to the principal officer of the order at Omaha, Neb., and was approved by him, and the first certificate was canceled, and the second issued. This last certificate was recognized by the order as binding upon it, and the money was paid to Mrs. Crouch upon the death of the insured.

Without going into the various questions discussed by counsel, we think the merits of this controversy lie within a very narrow compass.

When the first beneficial certificate was surrendered,

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it ceased to have any further force or effect. It does not matter whether the second certificate was regularly issued or not. It does not matter whether the adoption proceedings were regular and legal or not. It does not matter whether Mrs. Crouch was entitled to be a beneficiary or not in any insurance upon the life of the deceased, so far as the beneficiary in the first certificate is concerned. If there was any invalidity, irregularity, or want of authority in the issuance of the second certificate, the order is the party who was entitled to take advantage thereof, and was the only party so entitled. The complainant cannot recover on his original certificate, because it was extinguished by the act of the insured, and it does not matter what the motives of the insured were; he cannot recover upon the second certificate, because he is not beneficially interested in it; and he cannot recover from Mrs. Crouch the proceeds of that certificate, because it has been paid to her by the insurance company when he had no claim upon it or interest in it.

A provision in the constitution or by-laws of a mutual aid society, limiting the parties who may be made beneficiaries under certificates issued by the society, may be waived by the society, and cannot be taken advantage of by third parties. *Manley v. Manley*, 107 Tenn., 198, 64 S. W., 8; *Johnson v. Knights of Honor*, 53 Ark., 256, 13 S. W., 794, 8 L. R. A., 732; *Knights of Honor v. Watson*, 64 N. H., 518, 15 Atl., 125.

And the payment by an insurance company of an illegal and invalid insurance policy does not confer any

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basis in equity for outside parties to lay claim to the money. *Smith v. Pinch*, 80 Mich., 335, 45 N. W., 183.

The beneficiary in a policy in a fraternal order has no vested interest therein as against the insured, and has no right to assail a change of beneficiaries on any alleged ground of fraud, or because the second beneficiary was not of a class named in the code of the order. *Hoelt v. Knights of Honor*, 113 Cal., 91, 45 Pac., 185, 33 L. R. A., 174; *Brown v. Grand Lodge*, 80 Iowa, 287, 45 N. W., 884, 20 Am. St. Rep., 420.

The insured had a perfect right to surrender his policy on any ground and for any reason that he saw proper; and when the first certificate was canceled complainant ceased to have any interest whatever in the insurance, and, so far as he was concerned, it was entirely immaterial whether the insurance company ever issued another policy, or to whom it made payments of such policy, or what became of the proceeds of the same.

The court of chancery appeals find as a fact that no part of this second policy was to be paid to the first beneficiary. See cases of *Sofge v. Knights of Honor*, 98 Tenn., 453, 39 S. W., 853; *Fischer v. Fischer*, 99 Tenn., 635, 42 S. W., 448; *Schardt v. Schardt*, 100 Tenn., 280, 45 S. W., 340; *Catholic Knights v. Kuhn*, 91 Tenn., 219, 18 S. W., 385.

We see no possible theory upon which the complainant can recover, and the decree of the court of chancery appeals is affirmed.

Fuerst v. State.

FUERST *et al.* v. THE STATE.

(Knoxville. September Term, 1905.)

1. **INDICTMENT.** For assault with intent to commit murder in the first degree includes what offenses.

An indictment charging in one count an assault with intent to commit murder in the first degree, embraces by implication of law an assault to commit murder in the second degree, an assault with intent to commit voluntary manslaughter, an assault and battery and a simple assault.

2. **SAME.** Same. Verdict of "guilty as charged" is sufficiently certain, when.

A general verdict of "guilty as charged in the first count of the indictment," where the indictment contains but one count and charges in terms an assault with intent to commit murder in the first degree, is sufficiently certain as a verdict of guilty of assault with intent to commit murder in the first degree: and the statute requiring the jury, where the indictment charges murder, to ascertain in their verdict whether the offense is murder in the first or second degree, has no application to a prosecution for an *assault* with intent to commit murder.

Code cited and construed: 6441 (S.); 5351 (M. & V.); 4600 (1858); 7195 (S.); 6061 (M. & V.); 5222 (1858).

Case cited and distinguished: Waddle v. State, 112 Tenn., 556.

FROM KNOX.

Appeal in error from the Circuit Court of Knox County.—JOSEPH W. SNEED, Judge.

Fuerst v. State.

LINDSAY, SMITH & YOUNG, JOHN C. HOUK, R. A. MYNATT and L. C. HOUK, for Fuerst *et al.*

ATTORNEY-GENERAL CATES, for the State.

MR. JUSTICE NEIL delivered the opinion of the Court.

The plaintiffs in error were indicted in the circuit court of Knox county for an assault with intent to commit murder in the first degree upon the body of one Hal Dick, and were convicted and sentenced to three years in the State penitentiary.

The first question made is upon the verdict, which, omitting the formal parts, was as follows:

"They find the defendants guilty as charged in the first count of the indictment, and fix their punishment at three years in the State penitentiary."

There is only one count in the indictment. It charges, in terms, an assault with intent to commit murder in the first degree.

By implication of law, of course this count also embraces an assault with intent to commit murder in the second degree, an assault with intent to commit voluntary manslaughter, an assault and battery and a simple assault.

It is insisted on the authority of the case of *Waddle v. State*, 112 Tenn., 556, 82 S. W., 827, that the verdict in the present case is void. In that case it appeared that the plaintiff in error, Waddle, was indicted for the mur-

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der of one Pleas Nevels. The jury returned as their verdict:

"We find him guilty as charged in the indictment, with mitigating circumstances."

The court held that this verdict was a nullity, because in violation of section 6441 of Shannon's Code.

The section reads as follows:

"The jury before whom the offender is charged shall ascertain in their verdict whether it is murder in the first or second degree; and if the accused confess his guilt, the court shall proceed to determine the degree of crime by the verdict of a jury, upon the examination of testimony, and give sentence accordingly."

It was insisted for the State in that case that the finding of mitigating circumstances by the jury sufficiently indicated that the prisoner was guilty of murder in the first degree, since such qualification could only relate to that offense. In response to this contention, the court said: "In the face of the positive mandates of the statute, there is no room for intendments, or legal implication, for it imperatively requires that the jury shall ascertain in their verdict whether it is murder in the first or second degree."

It thus appears that the decision in the *Waddle Case* was based upon the language of the Code which we have quoted. That section, however, would not control in cases of the character we now have under consideration. It applies only to indictments for murder, and not to those for assaults, with intent to commit murder. Where,

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as in the present case, there is an indictment for an assault with intent to commit murder in the first degree, and the jury find the defendant "guilty as charged," the proper construction of such verdict is that the jury find the defendant guilty of the grade charged, in terms, in the count referred to. Such we deem to be the dictate of sound reason in the absence of any statute laying down a different rule. There is no such statute. On the contrary, the only section of the Code which bears upon this special subject supports the view which we have just expressed. Shannon's Code, section 7195. In this section it is provided that "upon an indictment for any offense consisting of different degrees, the jury may find the defendant not guilty of the degree charge in the indictment and guilty of any degree inferior thereto," etc. This indicates that upon the general verdict of guilty, except in cases governed by section 6441, the necessary conclusion would be that the defendant had been found guilty of the degree charged in terms in the indictment, and that in order to authorize the entry of a judgment on the verdict for a lower grade the jury would have to specify such grade therein.

It is suggested that this view of the matter is contrary to the conclusion reached by the court at the present term, in the case of *Webster Willis v. State*. In that case the indictment was for an assault with intent to commit murder in the first degree, and the verdict was: "We find the defendant guilty, and fix his punishment

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at two years in the penitentiary." This verdict was held void for uncertainty. Here, it is to be observed, the jury did not say they found the defendant "guilty as charged," as they do in the case now before the court; and it is to be observed also that they fix his punishment at two years, which they could not do if they had found the defendant guilty of an assault with intent to commit murder in the first degree, since the lowest term for that offense is three years. By fixing the term at two years, they indicated a purpose to find the defendant guilty of some lower grade, but what grade?

The statute (section 7195, *supra*) says, if they acquit him of the grade charged in terms, they shall specify the grade of which they do find him guilty. This was not done in the case referred to; hence the verdict was held to be fatally uncertain. It is apparent, therefore, that the decision in the *Willis Case* is not opposed to the decision reached by the court in the present case.

We have considered the other points in the case in the memorandum opinion filed with the record, and they need not be specially referred to here.

After considering all of the errors assigned, we are of opinion that there was no error in the action of the court below as to the plaintiffs in error, Fuerst and Richards, and the judgment should be affirmed as to them. It is reversed as to Ab Cassady, because the evidence is not sufficient to show his complicity in the crime.

Dixon v. Railroad Co.

**E. R. & R. I. DIXON v. LOUISVILLE & NASHVILLE RAIL-
ROAD CO.**

(Knoxville. September Term, 1905.)

- 1. CIRCUIT COURT.** Power of, to construe contracts affecting land sought to be condemned for railroad right of way.

Where proceedings to condemn a right of way for a railroad have been instituted in the circuit court, such court has complete jurisdiction to construe a contract, between the owner of the land and the railroad company, for the establishment of crossings, and to determine the rights of the landowner, not only under said contract, but also under the statute and under common law.

- 3. CHANCERY COURT.** Will not enjoin condemnation proceedings, when.

A court of chancery will not entertain a suit by a landowner to enjoin condemnation proceedings pending in the circuit court, involving matters stated in the first headnote, on the ground that the parties have not been able to agree as to number and location of railroad crossings, and that the number and location thereof would materially affect the damages sustained by said landowner.

FROM McMINN.

Appeal from the Chancery Court of McMinn County.
—T. M. MCCONNELL, Chancellor.

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BURKETT, MANSFIELD & MILLER, for Dixon.

ALLEN & IVINS, CORNICK, WRIGHT & FRANTZ and J. G. JOHNSON, for Railroad Company.

MR. JUSTICE WILKES delivered the opinion of the Court.

This is a bill to enjoin a proceeding in the circuit court of McMinn county, in which it is sought to condemn a right of a way for railroad purposes. The bill proceeds upon the theory that the railroad company will not construct sufficient and convenient crossings; and its object is to obtain a decree fixing the number and location of such crossings, and that the matter of assessing damages be passed upon by the chancery court, or by the circuit court after the chancery court has adjudicated the number and location of said crossings.

It is alleged that complainants executed a deed of conveyance to the Knoxville Southern Railroad of a right of way over this land, in which it was stipulated that the railroad company should put in good stock gaps and fix wagon road crossings as were necessary for the convenience of the grantors, and that this is an obligation which rests upon the defendant, the Louisville & Nashville Railroad, as the successor of the Knoxville Southern Railroad and as the owner of the original right of way, and that this obligation extends, not only to the right of way as originally located, but also to a new and additional location contemplated by the Louisville &

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Nashville Railroad under the act of 1903, authorizing condemnation for railroad rights of way within certain limits.

It is charged that in the condemnation proceeding a jury of view had gone upon the premises and assessed the value of the land taken at \$164 and the incidental damages at \$625, that the defendant has appealed from the jury's verdict, and its appeal is now pending in the circuit court of McMinn county undetermined. It is further alleged that the amount of damages accruing to complainant by reason of the taking and relocation of the line will depend largely upon the number and location of crossings installed and maintained by the company; that the complainants have not been able to agree with the railroad as to the number and location of such crossings, and they are wholly at a loss to know what crossings will be furnished; that both at common law and under the deed of conveyance referred to they have a right to convenient and sufficient crossings, properly located, and the amount of damages to which they are entitled will largely depend upon the number and location of these crossings.

The bill alleges that the question of these crossings should be adjudicated by the chancery court, and that it has jurisdiction to fix the same, and, having obtained and taken jurisdiction for that purpose, the court should maintain jurisdiction for all purposes, including the assessment of damages and the value of the land, and they ask to have all these questions settled in the chancery

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court, or, if this cannot be done, that the court fix the number, kind, and location of the crossings, and have them actually constructed, and a decree adjudicating the same certified to the circuit court, in order that that court may intelligently pass upon the amount of damages to which complainants are entitled.

There was a demurrer to the bill upon the ground that the jurisdiction of the circuit court to try all matters involved in condemnation proceedings was full, ample, and exclusive, or, at least, coextensive with the chancery court, and that no sufficient grounds are alleged for interference with the jurisdiction of the circuit court, which it has already acquired; that the question of crossings, so far as it can affect the measure of damages in condemnation proceedings, is one over which the circuit court has full jurisdiction in the condemnation proceedings; but if this be not so, complainants' rights in the matter of crossings cannot be prejudiced by a prosecution of the condemnation proceedings to their conclusion; that the law presumes the railroad company will do its duty with reference to the matter of such crossings, and the damages will be assessed under this presumption and upon this basis; and that there are no facts alleged from which it can be properly inferred that complainants will not be given all crossings to which they are properly and legally entitled.

The chancellor overruled the demurrer, and in the exercise of his discretion allowed an appeal to this court by the defendant; and it has assigned error.

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The controlling question presented in the case is whether the circuit court has full and complete jurisdiction to grant all the relief proper in condemnation proceedings, and whether the chancery court has any jurisdiction to interfere with it upon the allegation that the complainant landowners will not be fully protected in their rights in such condemnation proceedings.

The ground alleged in the bill, to show any embarrassment or want of power in the law court to fully protect the complainants and to invoke the aid of chancery, is that the amount of damages which will result will depend to some extent upon the number and location of crossings to be installed and maintained by the company.

If this be a sufficient ground for interference by a court of chancery, it is difficult to see why every condemnation proceeding is not liable to be moved from the circuit court to the chancery court, inasmuch as the question of crossings and location of the same will arise wherever a railroad passes through any man's land.

We cannot see that the court of chancery would have any more jurisdiction to pass upon the questions presented in this bill than the circuit court has. That court has as much right to construe the contract and the common-law and statutory right of the complainant to crossings, if to be built at the expense of the railroad, as the chancery court has.

We do not undertake to pass upon these questions as to what the rights of parties are as to crossings, but sim-

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ply hold that the circuit court has the power to determine the rights of complainants under their contract, under the statute and under the common law, as fully as the court of chancery would have.

Nor can we pass in the present case upon the question whether these rights can be set up in the condemnation proceedings or in a separate proceeding, if the railroad shall fail to do its duty.

For these reasons and upon these grounds we are of opinion that the chancellor was in error in overruling the demurrer to the bill and his decree is reversed, and the bill is dismissed, at the cost of complainants.

Telegraph Co. v. Greer.

WESTERN UNION TELEGRAPH COMPANY v. GREER.

(Knoxville. September Term, 1905.)

1. **TELEGRAPH COMPANIES.** Stipulation respecting notice of claim for damages—doctrine re-affirmed.

The holding of this court that a stipulation in a contract for the transmission of a telegram, exempting a telegraph company from liability for damages unless the claim is presented within sixty days after the message is sent, is reasonable and valid, is re-affirmed.

Cases cited and approved: *Telegraph Co. v. Courtney*, 113 Tenn., 482; *Manier & Co. v. Telegraph Co.*, 94 Tenn., 442, and cases cited in the opinion.

2. **SAME.** Same. Not applicable, when.

But such stipulation is not applicable where the suit is commenced within the specified time under a writ or pleading which sets out the facts with sufficient fullness to call the attention of the company to the particular message and conduct complained of.

Cases cited and approved: *Telegraph Co. v. Courtney*, 113 Tenn., 482; *Telegraph Co. v. Mellon*, 96 Tenn., 66, and cases cited in opinion.

3. **SAME.** Same. Applicable to actions for penalties.

The stipulation in a contract for the transmission of a telegram, exempting a telegraph company from liability for damages or statutory penalties unless the claim is presented within sixty days after the message is filed for transmission, applies to actions for statutory penalties as well as for damages.

Case cited and approved: *Telegraph Co. v. Mellon*, 96 Tenn., 66.

4. **SAME.** Same. Binding upon infants.

Such stipulations, being reasonable regulations of the business of telegraph companies, are binding upon infants, as well as adults, contracting therewith.

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FROM CLAIBORNE.

Appeal in error from the Circuit Court of Claiborne County.—P. G. FULKERSON, Special Judge.

GEORGE H. FEARONS, HUGHES & HUGHES, and SHIELDS, CATES & MOUNTCASTLE, for Telegraph Company.

G. W. MONTGOMERY, JESSE L. RODGERS and JOHN P. DAVIS, for Greer.

MR. JUSTICE NEIL delivered the opinion of the Court.

This action was originally brought before a justice of the peace under a warrant stating the cause of action to be "for failure to promptly and properly send and deliver a certain telegram." There was a judgment rendered against the company by the justice of the peace, and from this judgment an appeal was prosecuted to the circuit court. In that court a judgment was rendered in favor of the plaintiff below for \$200, and from this latter judgment the company prayed and obtained an appeal to this court.

The facts, so far as necessary to be stated, are as follows:

In January, 1905, the defendant in error, then a boy seventeen years old, left his father's home in Claiborne

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county, this State, without his father's knowledge or consent, and went thence to Louisville, Ky., and from that city to Decatur, Ill. When he reached Decatur he had only about \$1 or \$1.50 in his possession. He tried to obtain work, but could get nothing to do. He then went to the telegraph office and deposited a telegram, addressed to his uncle, "Bud" Greer, at New Tazewell, Tenn., the station nearest his father's home. This message was as follows, viz.:

"Decatur, Ill.

"To Bud Greer, New Tazewell, Tennessee:

"Send me fifteen dollars. Can't come home until I get it. See mama.

"HUSTON GREER."

For the transmission of this message Huston Greer paid the company's charge, fifty-nine cents. After he deposited the message he went to a hotel, where he remained all night, and returned the next morning to the telegraph office for a reply, but received none. After he had paid the charge for the message and his hotel bill he had only ten cents left. With that he bought something to eat. After his money was all gone he went to police headquarters, and told the officials in charge that he was out of money and had no place to stay. Thereupon he was admitted to the jail, where he remained and was lodged and fed, and kindly treated for ten days. At the expiration of this time he received sufficient money to bear his expenses, and was released from confinement and returned home. The money, however, was

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sent in response to a letter which he wrote and mailed to his father while he was in jail. The telegram, when it reaches the sendee, read "Decatur, Ala.," instead of "Decatur, Ill." A second telegram, sent the next day, met the same fate. The result was that defendant in error's home people were misled into believing that he was in Decatur, Ala., and made inquiries accordingly, the consequence of which was the ten days' delay complained of.

The blank form upon which the message was written contained on its face a stipulation that the terms on the back of it were assented to. One of these terms was expressed in the following language: "The company will not be liable for damages or statutory penalty in any case where the claim is not presented in writing within sixty days after the message is filed with the company for transmission."

The present suit was not brought until after the sixty days had expired.

Sundry errors are assigned by the company as follows:

That the court erred (1) in refusing to withdraw from the jury all evidence concerning the payment of money by defendant in error's father for the purpose of ascertaining his whereabouts; (2) in refusing to withdraw all evidence concerning the defendant in error's having gone to jail in Decatur, Ill.; (3) in instructing the jury that defendant in error could recover for grief, disappointment, or other injury to his feelings; (4 and 5) in

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submitting to the jury the question of punitive damages; (6 and 7) in refusing to charge the jury, in accordance with the request of plaintiff in error, that the defendant in error, although a minor, was bound by the sixty days' clause above set out; (8) in refusing to set aside the verdict on the ground that it was excessive, evincing partiality, prejudice, or passion.

In the view we take of the case, it is necessary that we consider only the sixth and seventh assignments.

In this State it has been held that the sixty days' clause is a reasonable and valid one. *Manier v. Telegraph Co.*, 94 Tenn., 446, 29 S. W., 732; *Tel. Co. v. Courtney*, 113 Tenn., 482, 82 S. W., 484. And the great weight of authority elsewhere is to the same effect. *Albers v. Telegraph Co.* (Iowa), 66 N. W., 1040; *Russell v. Telegraph Co.* (Kan.), 45 Pac., 598; *Webbe v. Telegraph Co.*, 64 Ill. App., 331; *Telegraph Co. v. Meredith*, 95 Ind., 93; *Tel. Co. v. Jones*, 95 Ind., 228, 48 Am. Rep., 713; *Telegraph Co. v. McKibben* (Ind. Sup.), 14 N. E., 894; *Telegraph Co. v. Yopst* (Ind.), 20 N. E., 222, 3 L. R. A., 224; *Lester v. Telegraph Co.* (Tex. Sup.), 19 S. W., 256; *Hill v. Telegraph Co.* (Ga.), 11 S. E., 874, 21 Am. St. Rep., 166; *Telegraph Co. v. Waxelbaum* (Ga.), 39 S. E., 443, 56 L. R. A., 741, 742; *Telegraph Co. v. Daugherty*, 54 Ark., 221, 15 S. W., 468, 11 L. R. A., 102, 26 Am. St. Rep., 33; *Telegraph Co. v. Phillips* (Tex. Civ. App.), 21 S. W., 638; *Smith-Frazier Boot & Shoe Co. v. Telegraph Co.*, 49 Mo. App., 99; *Kirby v. Telegraph Co.*, 7 S. D., 623, 65 N. W., 37, 30 L. R. A., 612, 621, 624, 46

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Am. St. Rep., 765. But the regulation is not applicable when the suit is commenced within the specified time, under a writ or pleading which sets out the facts with sufficient fullness to call the attention of the company to the particular message and conduct complained of. *Telegraph Co. v. Courtney*, supra; *Telegraph Co. v. Mellon*, 96 Tenn., 66, 33 S. W., 725. And see *Telegraph Co. v. Trumbull* (Ind. App.), 27 N. E., 313; *Telegraph Co. v. Karr* (Tex. Civ. App.), 24 S. W., 302; *Telegraph Co. v. Ferguson* (Tex. Civ. App.), 27 S. W., 1048. The principle underlying the cases supporting the rule is that the nature of a telegraph company's business requires it to receive and transmit thousands of messages within a comparatively brief space of time. Many of the particulars concerning these transactions are necessarily of a temporary and fleeting nature, and it is just that an opportunity should be given it to inquire into the facts and circumstances attending a mistake in a message, or delay in delivery, while the matter is still within the memory of witnesses. *Telegraph Co. v. Mellon*, supra; *Kirby v. Telegraph Co.*, supra (opinion of Fuller, J.). The reason applies as well where the suit is for a statutory penalty as where it is directly upon the contract. *Telegraph Co. v. Mellon*, supra; *Gray v. Telegraph Co.* (Ga.), 13 S. E., 562, 14 L. R. A., 95, 27 Am. St. Rep., 259; *Kirby v. Telegraph Co.*, supra; *Telegraph Co. v. Yopst*, supra; *Telegraph Co. v. Meredith*, supra; *Telegraph Co. v. Jones*, supra; *Albers v. Telegraph Co.*, supra; *Montgomery v. Telegraph Co.*, 50 Mo. App., 591; *Kendall v.*

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Telegraph Co., 56 Mo. App., 192. And it is the same whether the transaction be with an infant or with an adult. If a contract should be made by an infant with a telegraph company, under such circumstances as appear in the present case, such contract would be for necessities and binding upon him. He could not sue upon the contract and repudiate part of it. If the suit should be regarded as brought for the recovery of a penalty, or for damages in the nature of a statutory penalty, the result must be the same, since it has been held in this State that the sixty days' clause applies in such cases (*Tel. Co. v. Mellon*, supra); it being regarded as a reasonable regulation of the business. Resting on the basis it does, no reason is apparent why a minor should be excused from compliance with this regulation any more than an adult. Such persons must generally depend upon adult relatives or friends for the protection of their rights, and where the law makes no saving or exception in their favor the court can make none. Without doubt, owing to the great lapse of time and loss of evidence, the evils intended to be provided against by the rule would be very greatly intensified by establishing an exception in favor of persons under age and permitting them to sue after attaining their majority. Conceding that we have power to ingraft this exception upon the rule, the serious evils that would result from so doing would far outnumber and outweigh the few instances in which the rights of infants against telegraph companies for breach

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of duty would be lost by the failure of relative or friends to present their claims for them.

The point has been ruled in the same way as to infants in respect of contractual limitations in insurance policies. *Sugg v. Travelers Ins. Co.*, 9 S. W., 676, 1 L. R. A., 847; *Mead v. Ins. Co.*, 64 L. R. A., 79, 75 Pac., 475; *O'Laughlin v. Union Central Ins. Co.*, 3 McCrary, 543, 11 Fed., 280.

The sixth and seventh assignments having been sustained, the judgment must be reversed.

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C. C. GOSSETT v. SOUTHERN RAILWAY COMPANY *et al.*;
C. C. GOSSETT *et ux.* v. SOUTHERN RAILWAY COMPANY
et al.;

and

CALVIN GOSSETT, by Next Friend, etc., v. SOUTHERN
RAILWAY COMPANY *et al.*

(*Knowville*. September Term, 1905.)

1. **EMINENT DOMAIN.** Railroad and its construction contractors are liable for injuries to adjacent landowner, though done without negligence.

Railroad corporations, though quasi-public corporations, authorized by statute to condemn, take, and use land for railroad purposes and works of public improvement, are not exempt from liability for damages and injuries to private rights or property, even if done without negligence, and, therefore, a railroad and its construction contractors are liable in damages for injuries done to an adjacent landowner by their blasting, and by their construction of the railroad in front of and near his property, though the blasting is necessary, and is done without negligence. (*Post*, pp. 378-385.)

Cases cited and approved: Telephone Co. v. Railroad, 93 Tenn., 492; Terminal Co. v. Jacobs, 109 Tenn., 727, 741; Swain v. Copper Co., 111 Tenn., 437; Madison v. Copper Co., 113 Tenn., 331; Terminal Co. v. Lellyett, 114 Tenn., 368; Cogswell v. Railroad, 103¹ N. Y., 10; Garvey v. Railroad, 159 N. Y., 334; Railroad v. Church, 108 U. S., 317.

2. **SAME.** Same. Railroad and its construction contractors are liable for physical injuries and impairment of health resulting from blasting, but not for mere discomfort.

A railroad corporation and its construction contractors are liable in damages for injuries done to an adjacent landowner by nec-
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essary and skillful blasting, done without negligence, in the construction of the road, where such blasting creates loud noises and unusual and unpleasant concussions in the air, resulting in physical injuries or the impairment of health, but are not liable in damages for mere loss of sleep, discomfort, and inconvenience, not resulting in physical injuries or impairment of health. (*Post*, pp. 385-390.)

Cases cited and approved: Railroad v. Bingham, 87 Tenn., 522; Copper Co. v. Barnes (Tenn. Ch. App. and Sup.), 60 S. W., 593, 600, 607; Knoxville v. Klasing, 111 Tenn., 134; Kolb v. Knoxville, 111 Tenn., 311; Swain v. Copper Co., 111 Tenn., 432; Madison v. Copper Co., 113 Tenn., 331; Terminal Co. v. Lelleyet, 114 Tenn., 368; Fitzsimmons v. Braun, 199 Ill., 390; Longtin v. Persell (Mont.), 76 Pac., 699, 65 L. R. A., 655; Colton v. Onderdonk, 69 Cal., 155; Tiffin v. McCormack, 34 Ohio St., 638; Scott v. Bay, 3 Md., 431.

3. **SAME. Same. Same. Whether railroad blasting operations created a nuisance and drove plaintiff from his home, and lessened the usable and rental value thereof, should be submitted to the jury.**

Where an adjacent landowner sues a railroad corporation and its construction contractors for blasting and other operations carried on by the defendants, which, it is averred and proved, constituted a nuisance that drove the plaintiff and his family from his home, and so interfered with his comfort as to lessen the desirability and usable value of his home during the time the said blasting work was being prosecuted, the plaintiff is entitled to recover, and the question should have been submitted to the jury on this theory. (*Post*, pp. 390, 391.)

2. **ACCORD AND SATISFACTION. Must be specially pleaded to be available as a defense.**

The defense of accord and satisfaction of plaintiff's claim for damages must be specially pleaded, and cannot be made under the general issue or plea of not guilty. (*Post*, p. 391.)

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5. **RAILROADS.** Joint liability of railroad and its construction contractors for injuries resulting from blasting; no primary and secondary liability.

In an action by an adjacent landowner against a railroad corporation and its construction contractors for injuries sustained by blasting operations incident to the construction of the railroad, the liability of the defendants, if any, is joint, and there is no primary or secondary liability. (*Post*, p. 391.)

FROM KNOX.

Appeal from the Circuit Court of Knox County.—JOSEPH W. SNEED, Judge.

PICKLE, TURNER & KENERLY and E. F. MYNATT, for Gossett.

JOUBOLMON, WELCKER & HUDSON, for Railroad and S. P. Condon.

TEMPLETON, LINDSAY & TEMPLETON, for W. J. Oliver.

MR. JUSTICE WILKES delivered the opinion of the Court.

These three causes were consolidated and heard together in the court below against the Southern Railway Company, W. J. Oliver, and S. P. Condon for damages resulting from blasting near the premises and home of the plaintiffs.

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Some wordy controversy is had as to whether it is an action for a nuisance or an action on the case, with which we need not concern ourselves. The action is plainly one on the facts of the case; and the facts set out in the declaration, so far as necessary to be stated, are that plaintiff C. C. Gossett owned and occupied as a residence a certain house and lot near Knoxville. His wife and minor child, about two years old, resided with him and constituted his family. The defendant railroad located, graded, and constructed its line immediately adjoining the home and premises of the plaintiff, and within a few feet of their lot and residence house. Large quantities of dynamite and high explosives were used day and night for a long time in blasting and loosening earth and rock in the construction of the road by the railroad, and by Oliver and Condon, as contractors, causing great noises and explosions, shocks and concussions, of the earth and the air, near and at the home of the plaintiff, and greatly alarming and frightening the plaintiffs Carrie and Calvin Gossett, so as to deprive them of the necessary sleep, rest, and repose, and, it is claimed, impairing the health of the said Carrie, and alarming and terrorizing said Calvin, until they both became sick and disordered in body and mind, nervous, and otherwise injured, driving them away from home, at great trouble and expense, for several months.

To the declaration in each case, the defendants plead not guilty.

It appears that the railroad was constructing its line

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in front of the plaintiff's premises, and had a force of from eighty to one hundred men employed at it, working day and night, for twenty hours per day. They blasted rock during the day and during the night, using both deep blasts and surface or adobe blasts. This was done in a cut about fifteen feet from plaintiffs' property, and thirty feet from their house.

The house was struck by flying stones, and the weatherboarding was shattered. The concussions were so great that the windows in the house were smashed, and crockery, china, fruit jars, clocks, pictures, and other personalty were broken, shattered, and otherwise injured. Carpets, mattings, and curtains were likewise injured by the dust. The work was continued from August, 1903, to June, 1904, and as a consequence of the nervous strain and fright the wife and child were rendered very nervous, and deprived of rest and sleep during the night; and about January, 1904, they were compelled to leave their home and seek refuge and temporary rest in another locality. Gossett was put to extra expense in maintaining his family away from home, and at the same time looking after his property at home.

It appears that defendants repaired plaintiffs' house, so far as physical damage was done to it by the explosions; and for these and the injury to personal property no recovery is sought, but only for the injury, physical and mental, done to the plaintiff and his wife and child, and rendering the house uncomfortable and less valuable as a residence. At the conclusion of the evidence the de-

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defendants moved the court for peremptory instructions that there could be no recovery by the wife and child, on the ground that no physical injury had been shown to them, and therefore no recovery could be had in their behalf.

The court sustained this motion, and directed a verdict in favor of the defendants in these two cases, to which action the plaintiffs excepted. He then charged the jury in the third case of C. C. Gossett against the defendants, and under that charge the jury rendered a verdict in favor of the defendants, and the plaintiffs have all appealed to this court.

It is assigned as error that the court improperly instructed the jury to render a verdict in favor of the defendants against the wife and child, and, also, that he erred in his charge to the jury in regard to the liability of the defendants to C. C. Gossett, and that he refused to give in charge to the jury certain requests made by the plaintiffs. It is also assigned as error that there is no evidence to support the verdict.

Without attempting to dispose of the assignments of error as they are made, we proceed at once to consider the several interesting and difficult questions which are presented by the record and the assignments of error, premising that we think that they have all been virtually settled by former adjudications of this court, most of which are quite recent.

In the first place the fact that the defendant is quasi public corporation, authorized by the legislature to con-

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demn, take, and use land for railroad purposes and works of public improvement, cannot, under the authority conferred upon it by the legislature, exempt it from liability, even if the work can be done without negligence.

We think the true doctrine is aptly expressed in the case of *Cogswell v. R. R.*, 103 N. Y., 10, 8 N. E., 537, 57 Am. Rep., 701:

"The powers granted to such railroad corporations are to be construed as privileges conferred, but upon the understanding that they shall be exercised in strict conformity to private rights, and under the same responsibility as though the act were done by an individual in the exercise of such powers." See, also, case of *Garvey v. L. I. R. R. Co.*, 159 N. Y., 334, 54 N. E., 57, 70 Am. St. Rep., 550.

The court proceeded upon the idea, and charged the jury upon the theory, that the railroad company and its contractors in constructing the railroad were engaged in what might be termed "governmental functions," delegated, first, to the railroad company by the State, and by the railroad company to its agents employed to do the work, and that if no damage and injury were done to the plaintiffs than what was necessary to be occasioned in the prosecution of such work, then the defendants would not be liable. In other words, if the work was authorized and legitimate, then the defendants could only be made liable for the negligent prosecution of it. This is contrary to the holdings of this court, and, as we think, to the great weight of authority, though there are

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cases, a few of which have been cited to us by counsel, holding that, if the work is legitimate, then the only damage than can accrue to the company prosecuting the work must arise out of its negligent execution. In the case of *Madison v. Ducktown Copper Co.*, 113 Tenn., 331, 83 S. W., 658, it was held that the defendants were conducting a lawful business in a lawful way, and by the most scientific and approved methods, and had made every effort known to science and experience to avoid injury to the plaintiff, but injury had resulted as a necessary consequence of the work itself; and the court further held that there was no other place to which the hurtful operations could be transferred. Still the court said that a judgment for damages in this class of cases is a matter of absolute right, where injury is shown.

This was a case where injury was inflicted by noxious fumes and smoke spreading from the furnace property over adjoining property, so as to create a nuisance and injure the adjoining property.

In the case of *Cumberland Telephone Company v. United Electric Railway*, 93 Tenn., 492, 29 S. W., 104, 27 L. R. A., 236, it was held, in substance, that a person, even in the prosecution of a lawful trade or business upon his own land, cannot gather there by artificial means a natural current, like electricity, and discharge it upon his neighbor with such force and to such an extent as to break up his business or impair the value of his property, without being responsible for the resulting injury.

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The *Fifth Baptist Church Case* is a leading case upon this question; and it was there held, among other pertinent matters, that grants of privileges or powers to corporate bodies, like railroads, conferred no license to use them in disregard of the private right of others, and with immunity for their invasion. It was there said:

"The great principle of the common law, which is equally the teaching of the Christian morality so to use one's property as not to injure others, forbids any other application or use of the right and power conferred."

In the same case it is said:

"The acts that a legislature may authorize, which without such authorization would constitute nuisances, are those which affect public highways or public streams, or matters in which the public have an interest and over which the public have control. The legislative authorization exempts only from liability to suits, civil or criminal, at the instance of the State. It does not affect any claim of a private citizen for damages for any special inconvenience or discomfort not experienced by the public at large."

See case of *Railroad Co. v. Fifth Bap. Church*, 108 U. S., 317, 2 Sup. Ct., 719, 27 L. Ed., 739.

In the case of *Terminal Company v. Jacobs*, 109 Tenn., 741, 72 S. W., 957, 61 L. R. A., 188, it is said:

"To claim exemption from liability resting upon a charter right, the answer may properly be made that the State has not authorized the wrong complained of; and in locating its roundhouse, so that the injury necessar-

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ily resulted to the adjacent landowner, it did so at its peril."

And, again, it is said:

"Grants of powers to corporate bodies like these can give no license to use them in disregard of the rights of others, and with immunity for their invasion."

To the same effect, see the case of *Swain v. Tenn. Copper Co.*, 111 Tenn., 437, 78 S. W., 93. All of these cases have been cited, analyzed and commented upon in the case of *Louisville & Nashville Terminal Co. v. Lelleyett*, 114 Tenn., 368, 85 S. W., 886 et seq., and many other cases, are there referred to. The gist of these decisions, so far as applicable to the facts of the present case and the questions here involved, is that a railroad company, in constructing its road, although it may be guilty of no negligence and exercise proper care and caution, will still be liable to adjacent property-owners, if the work done, although necessary to be done, and in fact skillfully constructed, shall result in injury to such property. Most of the cases cited by counsel holding a contrary doctrine are cases in which the work was being done under government directions and control; and, so far as they do not rest upon this feature of government regulation and control, they are not in accord with the holdings of this court, nor, as we think, with the weight of authority, nor are they in accord with sound reason and legal justice.

It remains to be considered whether the injuries com-

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plained of in these cases were injuries of which liability arises.

In *Fitzsimmons & Connell Company v. Braun & Fitts*, 59 L. R. A., 421, 199 Ill., 390, 65 N. E., 249, it was held that one who uses high explosives in excavating so near the property of another that the natural and probable result of an explosion will be injury to such property is liable for injuries caused even by the vibration of earth or air, however high a degree of care he may have exercised in their use. To the same effect in *Longtin v. Persell* (Mont.), 76 Pac., 699, 65 L. R. A., 655; *Colton v. Onderdonk*, 69 Cal., 155, 10 Pac., 395, 58 Am. Rep., 556; *Tiffin v. McCormack*, 34 Ohio St., 638, 32 Am. Rep., 408; *Scott v. Bay*, 3 Md., 431.

Mr. Thompson, in his work on Negligence (section 772), uses this language:

"The subordinate courts of the State of New York, following the analogy of early decisions in that State, have held that a railroad company is liable to an adjoining property-owner for injuries which are the direct and necessary result of blasting rock by such company for the purpose of leveling its right of way, although such blasting is done without negligence, and although no rock or dirt is thrown upon the adjoining premises. But the court of appeals of that State have more recently held otherwise. In one of these decisions the action was against a contractor executing public work under the United States, and the decision proceeded partly upon the ground that he was acting in virtue of the sovereign-

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ty of the United States, and could not more be called to answer in damage than the government could. But the other case holds that a railroad company, in grading its right of way, can shake a dwelling house to pieces by the concussions produced by the frequent firing of blasts, without being liable to pay any damages therefor, provided it is made to appear that the blasting is necessary and that it is done without negligence. This decision, though concurred in by whole court, is directly opposed to principles laid down by the same court in early cases. It manifests such gross insensibility to justice that, although concurred in by the whole court, it scarcely deserves respectful mention."

Mr. Thompson, in his notes, cites the various cases referred to, most, if not all, of which are relied on by counsel in this case.

His own opinion of the law proceeds upon the view that the carrying on of an employment so dangerous near the land of another, thereby keeping him in continual danger and alarm, is a nuisance *per se*; so that, if any damage happens to him thereby, he may recover, irrespective of the question of diligence or negligence in carrying on the dangerous work. And he says:

"If it is a nuisance *per se*, and the existence of negligence is necessary to support an action for the damage, it is for the same reason negligence *per se*."

Most of the cases to which we have been referred and which we have been able to find, involving damages by blasting, proceed upon the idea of a trespass upon the

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adjoining property, where dirt or rock or other material is actually thrown upon it, as where the buildings and improvements are damaged and shaken; and the right of recovery in such cases seems to be clear, as it is also where water is illegally thrown upon a man's land, but the present case goes further than this. All these physical damages to the property caused by the blasting, it is shown, have been settled for and satisfactorily adjusted. The present action is for rendering the home uncomfortable, insecure, and unpleasant, and for virtually compelling the occupants to vacate the premises during the time when the work was being prosecuted; and it is said that the noise and discomfort from the repeated concussions and loud noises was so great as to affect the comfort and health of the family. It is not shown that any of them were made sick; but they were inconvenienced, frightened and made restless, so that the home was no longer a place of refuge and quiet, and it became untenable as a home for several months, and it is for this class of damages that the suit is brought; and the argument is made that there is liability for noise which creates discomfort and nervous disturbance, just as there is for gas and smoke, solids and liquids, which affect the comfort and health of the tenant. Our courts have recognized the right to damages in cases of nuisances arising from foul odors, smoke, and gas; and there is no good reason why the same doctrine would not apply to loud noises and unusual and unpleasant concussions in the air. In support of this

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doctrine we are referred to *Knowville v. Klasing*, 111 Tenn., 134, 76 S. W., 814; *Kolb v. Knoxville*, 111 Tenn., 311, 76 S. W., 823; *Swain v. Copper Company*, 111 Tenn., 432, 78 S. W., 93; *Ducktown Copper Co. v. Barnes* (Tenn. Sup.), 60 S. W., 600; *Madison v. Copper Co.*, 113 Tenn., 336, 83 S. W., 658.

Bearing upon this feature of the case, it is said that in *L. & N. Terminal Co. v. Lellyett*, 114 Tenn., 368, 85 S. W., 889:

"It is not every inconvenience or discomfort that will entitle a property-holder to damages, even though it be material or considerable, and especially as against a public or quasi public enterprise. The noise of paved streets and street cars is a material discomfort to abutting owners. The smoke from factories, hotels, and manufacturing establishments may form a material annoyance and discomfort to persons living near by; but these are discomforts and annoyances which the individual must bear in deference to the convenience and comfort of the public. The noise of trains passing through the country districts, and the dust of vehicles passing along public highways, may be great annoyances to persons living along the line of such highways, and the rumbling of carriages of belated revelers and early market wagons along the paved highways may disturb the slumbers and harass the nerves of persons who desire to sleep in the cities; but is not for such annoyances and discomforts that the law allows redress, but only where the discomfort and inconvenience proceeds to such an extent as to injure the usable and rental or permanent value of

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the property that the law will award damages. It must amount, to some extent, to the taking of the value of the property, either temporary or permanent, and depriving the owner thereof. See *Railroad v. Bingham*, 87 Tenn., 522, 11 S. W., 705, 4 L. R. A., 622."

In such case it is a nuisance and actionable. And this is the rule that prevails in all cases, whether it be an individual, a private corporation, or a quasi public corporation. In all such cases the maxim *sic utere tuo* applies, and no matter how lawful or necessary the improvement may be, nor skillfully it may be constructed, nor carefully it may be operated, if it results in injury to the adjoining property-owner, the party causing it is liable in damages, either recurring or permanent, dependent upon whether the nuisance is abated or not.

Under the rules which we have laid down in the cases we have cited and commented upon, we are of opinion that there could be no damages, or rather no liability, to the wife and child in this case.

There is no evidence that they were physically injured, nor that their healths were impaired. The most that is proven is that they were disquieted and kept in a state of alarm and apprehension, but this is not shown to have resulted in any sickness or physical injuries.

We think, therefore, that the trial judge was not in error in instructing the jury that these parties had no right of action.

The question which should have been submitted to the jury, in our opinion, is whether the injuries complained

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of in this case amounted to a nuisance, and whether the usable or rental value of the homestead was destroyed or lessened temporarily to such an extent that the law will award damages therefor.

It is not claimed that there were any permanent damages to the freehold. We think the case should have been submitted to the jury upon this theory, and, in not doing so, the trial judge committed error. If the plaintiff was driven from his home by the blasting and other operations carried on by the defendants, or his comfort was so interfered with as to lessen the desirability and usable value of his home during the time the work was being prosecuted, for these things the plaintiff should be entitled to recover.

The trial judge instructed the jury that they might find an accord and satisfaction of the plaintiff's claim for damages, if the facts should so justify.

We think this was error, as there was no plea of accord and satisfaction, and that defense could not be set up under the general issue or plea of not guilty.

We think that, if there is any liability for damages under the facts of this case, it is a joint liability upon the part of the railroad and the contractors, and in such case we do not understand that there is such a thing as primary and secondary liability.

For the reasons which we have indicated, the judgment of the court below in the case of *C. C. Gossett v. Southern Railway Company et al.* is reversed, and the cause is remanded for a new trial, and the defendants

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will pay the costs of the appeal; and the judgments in the cases of *C. C. Gossett and Wife*, and *Calvin Gossett, by Next Friend*, v. *Southern Railway Company*, are affirmed, and these causes are dismissed, at the cost of the plaintiffs herein.

Hardwick v. American Can Company.

J. H. HARDWICK *v.* AMERICAN CAN COMPANY.*(Knowville. September Term, 1905.)*

1. **CHANCERY PLEADING AND PRACTICE.** Supplemental bill in nature of bill of review by defendant pending a decree of reference to present newly discovered evidence, when.

A supplemental bill in the nature of a bill of review may be filed by the defendant, by leave of the court, for the purpose of putting in issue material and determinative new matter discovered after the filing of the answer, and after the passing of the decree of reference, and while the said decree is in process of execution before the master, where such bill shows due diligence, and that the new matter could not reasonably have been ascertained prior to its discovery. (*Post*, pp. 394-399.)

Cases cited and approved: Long v. Granberry, 2 Tenn. Chy., 85; Laidley v. Merrifield, 7 Leigh (Va.), 346, 353, 354; Baker v. Whiting, 1 Story, 218, Fed. Cases, No. 786; Jenkins v. Eldredge, 3 Story, 299, 307, Fed. Cases, No. 7,267; Deitch v. Staub, 115 Fed., 310-316, 53 C. C. A., 137.

2. **SAME.** Same. Defendant's supplemental bill in the nature of a bill of review presenting an inconsistent defense should not be allowed to be filed, when.

Where, in a suit for the breach of a contract to purchase stoves, the defendant pleaded in his answer as a defense that the stoves were so defective that he could not handle them, and that they were totally unsuited for the purposes for which they were contracted and intended to be resold, a supplemental bill in the nature of a bill of review, alleging that the complainant therein, who was the defendant in the original suit, had sustained a loss of five thousand dollars by reason of the fact that the complainant in the original suit pending the running of the contract, and in breach thereof, had sold between one thousand

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and fifteen hundred stoves to another dealer in his (original defendant's) trade territory, presents a defense inconsistent, incongruous, and conflicting with that originally made in the answer and should not therefore be permitted to be filed, (*Post*, pp. 399-401.)

FROM HAMILTON.

Appeal from the Chancery Court of Hamilton County.—T. M. McCONNELL, Chancellor.

BROWN & SPURLOCK and PRITCHARD & SIZER, for complainant.

WHEELER & TRIMBLE and WHITE & MARTIN, for defendant.

MR. JUSTICE NEIL delivered the opinion of the Court.

This case was before us at the last term. The opinion then delivered appears in fifth Cates, at page 657. At the former hearing the case was remanded to the chancery court for an account and for other purposes. It is now before us again on appeal from the action of the court of chancery appeals in respect of the disposition which it made of the report of the master, and of the decree of the chancellor thereon and in respect of an application made in the chancery court for the filing of a

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supplemental bill in the nature of a bill of review, and for the disposition of questions related thereto.

We shall not take up these questions in the order just stated, but in what seems to us the most convenient sequence.

1. The defendant filed in the court below a supplemental bill in the nature of a bill of review, for the purpose of putting in issue new matter discovered after the filing of the answer, and after the passing of the decree of reference and while the latter decree was in process of execution before the master. This bill shows that due diligence was exercised on the part of the defendant and that the matter could not reasonably have been ascertained prior to the time at which it was discovered. Assuming the evidence to have been material and determinative, the question arises as to the proper practice in such cases. We are not aware that this precise question has ever before been determined in this State. The cases are numerous wherein final decisions have been reviewed under bills of review. But we know of no case in our reports where the question has arisen in respect of an interlocutory decree.

The following authorities indicate the true conclusion:

In *Laidley v. Merrifield*, 7 Leigh (Va.), 346, 353-4, it is said:

"A bill of review strictly speaking, is a proceeding to correct a final decree in the same court, for error apparent on the face of the decree or on account of new evi-

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dence discovered since the final decree. The decree being final, the bill of review is not regarded as a part of the cause in which the decree was rendered, but as a new suit, having for its object a correction of the decree in the former suit. But where a decree is only interlocutory but liable to the same objection, the party injured must seek his redress, not by a bill of review, as such, but by petition or supplemental bill in the nature of a bill of review. Such petition or supplemental bill is regarded as a part of the very cause, the decree in which is sought to be corrected, and any order or decree of the court on the petition or bill is only interlocutory." Story's Equity Pl., sec. 425; Daniels' Chancery Pl. and Pr. (5th Ed.), 1537.

The new matter must be brought to the attention of the court as soon as discovered. If, after discovering such matter, the party allow the case to go to a final decree, he can not use the new matter. Story's Equity Pl., sec. 423.

In *Baker v. Whiting*, it is said:

"To compel the petitioner to wait until a final decree and then to apply for a bill of review, or a bill in the nature of a bill of review would not only occasion great delay, but also great expense to the parties, which ought, if practicable, to be avoided. 1 Story, 218; Fed. Cases, No. 786. See also *Jenkins v. Eldredge*, 3 Story, 299-307; 13 Fed. Cases, p. 504, case 7267.

In the last cited case, Judge Story used this language:

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"The real question, therefore, for the consideration of the court is, whether leave should be granted to file a supplemental bill to bring forward the new evidence. In substance, there is no difference between this case and the case of leave to file a bill of review, or a bill in the nature of a bill of review, except that the latter is solely applicable to cases where there has been a final decree, whereas cases like the present may be before or after an interlocutory decree."

In his work on Equity Pleadings, Judge Story says:

"It has been established that matter discovered after a decree has been made, although not capable of being used as evidence of anything which was previously in issue in the case, but constituting an entirely new issue *may well* be the subject of a bill of review." Story's Equity Pl. sec. 416.

Such a supplemental bill may be filed not only by a complainant, but also by a defendant. In the work just referred to, it is said:

"Hitherto we have chiefly considered supplemental bills on the part of the plaintiff; but they may also be brought in behalf of the defendant in the suit. Where the matter is newly discovered evidence on the part of the defendant after the cause is at issue, or after the publication is passed or even after a hearing or decree, the defendant may by petition to file a supplemental bill, obtain relief." *Id.*, sec. 337c.

The subject was recently gone over *to some extent* in an opinion by Judge Lurton in the case of *Deitch v.*

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Staub, 115 Fed. Rep., 310-316. In that case it appeared that Staub, as receiver of the Knoxville Building & Loan Association, brought suit against Deitch in the federal court to enforce two mortgages which had been executed for money loaned. Deitch, the defendant, raised the question of usury. On an interlocutory decree, Judge Clark decreed that there was no usury, and referred the case to the master to report on the indebtedness. While the matter was pending before the master new evidence was discovered and offered, showing usury. The master declined to consider the new proofs, and there was an exception for this reason. On appeal it was held in the circuit court of appeals that the master could not consider the newly-discovered evidence because of the interlocutory decree and that the proper practice was for the defendant to bring a supplemental bill setting up the newly-discovered evidence and seeking to rehear the interlocutory decree.

Such a bill, "if maintainable at all, should properly in its prayer, be for leave to file a supplemental bill to bring forward the new evidence, and for a rehearing of the cause at the time when the supplemental bill should also be ready for hearing." *Jenkins v. Eldredge*, *supra*, p. 305.

In *Daniels Chy.* Pl. and Pr. it is said:

"A bill of this description can not be filed without leave of the court having first been granted. In order to obtain permission for this purpose, a petition must be presented supported by an affidavit to show that the new

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matter could not be produced or used by the party claiming the benefit of it at the time the decree was made." *Id.* (5 Ed.), 1537, p ——. But a bill may be drawn so as to serve the purpose of both a bill and petition and so presented to the court for leave to file. *Long v. Granberry*, 2 Tenn. Chy., 85; *Gibson*, Suits in Chancery, secs. 1074, 1080.

2. From what has just been said, it is apparent that, nothing else appearing, the chancellor should have allowed the filing of the supplemental bill offered by the defendant, and likewise that the court of chancery appeals, but for a fact to be presently stated, acted correctly in granting the permission.

In order to properly understand the fact on which the question turns, it should be stated that the complainant and the defendant had mutually entered into a written contract wherein the defendant agreed to purchase from the complainant 5,000 stoves, and the complainant, among other things, agreed not to sell any stoves during the running of the contract, in the State of Georgia. It was alleged in the supplemental bill filed by the defendant that after the decree of reference had been awarded and the terms had adjourned at which that decree was rendered, the defendant had, by the exercise of great diligence, discovered a secret arrangement between the complainant and the firm of Bondurant & Company, of Athens, Georgia, whereby the complainant had sold to this firm a large number of stoves. It was alleged in the supplemental bill that the defendant had been greatly

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injured by this secret transaction between Hardwick and Bondurant & Co. It is insisted on the part of the complainant that this new defense ought not to be permitted because in direct conflict with a leading defense set up in the original answer.

In the original answer one of the defenses set up by the Can Company was that the stoves manufactured by the complainant were so defective that it could not handle them. The answer contained upon that subject, the following:

"It is true that this defendant did order of the complainant 1191 stoves at the prices named in the said Exhibit A, and that the complainant did ship to this defendant 1191 stoves, and at the time of shipment collected from this defendant the contract price therefor, and that the defendant has not ordered nor accepted from the complainant any more stoves than those thus shipped and paid for; but said stoves so shipped and paid for were not such stoves as were required by the terms of the contract and were not merchantable stoves, and by reason of defective material and workmanship *were totally unsuited* for the purposes for which they were sold, and by reason of said defective material and workmanship, and said unmerchantability the defendant was unable to sell any more of said stoves than those shipped to it as aforesaid, although it used its best efforts so to do.

"The defendant was damaged to the extent of \$5,000 through loss of trade and customers, and in loss of its business reputation, and in the time of its servants and

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employees, and otherwise, by reason of the aforesaid defective character of the stoves so delivered, and was further damaged in the sum of \$5,000 by reason of its failure to sell any more than 1191 of complainants stoves, owing to the same aforesaid defects."

The supplemental bill is based upon the ground that the complainant therein, the defendant to the original bill, had sustained loss by reason of the fact that the complainant pending the running of the contract, had sold between 1,000 and 1,500 stoves to Bondurant & Co. This seems to be entirely in conflict with the defense set up in the original answer that the goods were worthless, and that the defendant had suffered loss in selling such as he had sold, and great injury to his credit and reputation in attempting to sell others.

On the ground of this incongruity between the two defenses, we do not think that the supplemental bill should have been permitted to be filed; and that the court of chancery appeals erred in giving such permission.

3. We are of opinion that the court of chancery appeals acted correctly in assessing the damages at \$1182.38 with interest from August 1, 1902. We deem it unnecessary to go into the particulars of this matter, being entirely content with the view taken of that branch of the case in the opinion of the court of chancery appeals.

A decree will be entered here in favor of the complainant for \$1182.38, with interest from August 1, 1902, with costs.

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CINCINNATI, NEW ORLEANS, & TEXAS PACIFIC RAILWAY
COMPANY v. E. G. SAULSBURY.

(*Knockville*. September Term, 1905.)'

1. **NEGLIGENCE.** Inferred by jury as a matter of fact where there is a collision of railroad trains, without explanation of the cause, when.

Where there is a collision of railroad trains, the jury will be warranted in drawing an inference of negligence on the part of the railroad company as a matter of fact, but not as a presumption of law, where it appears that the company used the block system of signals, and that a red block signal was displayed which could have been seen by the engineer for the distance of a half mile, and the company failed to introduce any testimony explaining the cause of the collision. (*Post*, pp. 405, 406.)

Case cited and approved: *Young v. Bransford*, 12 Lea, 234.

2. **RAILROAD.** May contract against liability for destruction of stave mill and contents on its right of way, by fire or any cause whatever.

A railroad company in granting a license for the erection of a stave mill on its right of way is not acting in its capacity or character of a common carrier, and it may, as other corporations or persons, contract against liability for destruction of or injury to said stave mill and contents by fire or by any cause whatever, and such contract is in no way violative of the doctrine of public policy. (*Post*, pp. 409-413.)

Cases cited and approved: *Griswold v. Railroad*, 90 Iowa, 265; *Insurance Co. v. Railroad*, 175 U. S., 91; *Railroad v. Carter* (Tex. Sup.), 68 S. W., 159; *Stevens v. Railroad*, 109 Cal., 86.

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3. **SAME.** Same. Mill and contents include staves piled on railroad right of way under terms of a lease contract, when.

Under a contract of a railroad permitting the erection of a stave mill on its right of way to be used as a "place of manufacture, storage, and shipment" of staves, with a provision against liability for destruction or injury of said "stave mill and contents" by fire or by any cause whatever, the terms "stave mill and contents" include and embrace all staves, whether finished or not, piled on the railroad right of way in close proximity to the mill, and the railroad is not liable for the destruction of such staves by fire. (*Post*, pp. 404, 413-415.)

4. **SAME.** Same. Same. Liability for goods loaded for shipment and destroyed by fire.

But the railroad is liable as common carrier, where staves loaded in a freight car on its track ready for shipment are destroyed by fire through its negligence inferred as stated in the first headnote, notwithstanding the contract as stated in the second and third headnotes. (*Post*, pp. 404, 415.)

FROM SCOTT.

Appeal from the Circuit Court of Scott County.—G.
M. HENDERSON, Judge.

H. CLAY JAMES and HEAD & ANDERSON, for Railroad.

DENTON & ROBINSON and BAKER & KEENE, for Saulsbury.

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MR. JUSTICE M'ALISTER delivered the opinion of the Court.

The plaintiff below recovered a verdict and judgment against the railroad company for the sum of \$1,895.87 as damages for the destruction of a lot of staves by fire alleged to have been occasioned by the negligent operation of its trains.

Saulsbury & Co., it appears, had been granted a license by the railroad company to erect a stave mill on its right of way, under a written lease or contract which, among other conditions, provided as follows:

"That they [meaning Saulsbury & Co.] will save and hold harmless the trustees of the Cincinnati Southern Railway and the said railway company, from all damages that may arise from the destruction or injury of said stave mill and contents by fire or from any cause whatever."

The theory of the plaintiff below is that defendant company is not protected from liability by the terms of said contract for the reason: First, that the fire was caused by the negligence of the company and its agents; and, second, that the staves destroyed were not a part of "the mill and its contents," which were alone exempted in said written lease.

It does not appear from the record that the mill itself and its immediate contents were destroyed, but the fire consumed about 34,398 staves which were stacked on the right of way near the mill, and 6,000 staves which had been loaded onto a freight car ready for shipment. A

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portion of the staves destroyed were undressed and had been stored on the right of way for use in the mill, while another portion of the staves destroyed had been dressed and were ready for shipment. It appears that the staves that were burned were lying between the mill and the railroad on the north side of the mill near the corner of the mill. The mill is described in the record as a shed open on three sides. The fire originated in the collision of two trains on the company's right of way near this mill, and as a result of the collision several tanks of oil burst, the oil caught fire, and was communicated to these staves. It further appears that, during the progress of the fire, the employees of the railroad company, for the purpose of preventing the destruction of the passenger track, diverted the flow of the burning oil to the staves of the plaintiff. The passenger track, it appears, was located on the opposite side of the premises of the plaintiff. It thus appears from the proof that the employees of the railroad, in order to save the property of the company, turned the contents of a tank of oil into these staves, which otherwise would not have flowed in that direction. It should be stated, however, that this phase of the case is not presented in the declaration.

It should be remarked that there is no direct evidence of negligence on the part of the company in bringing two of its trains into collision, except such as arose from the mere fact of the collision. It does appear, however, that this railroad company used what is known as the block system, and that the display of the red signal could have

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been seen by the engineer for a distance of half a mile. The block is illuminated in red by means of electricity transmitted through a wire along the rails. It is shown in the proof that a red block was displayed, and that, under the rules, it was the duty of the engineer to send a flagman ahead and wait five minutes. The company failed to introduce any proof explaining the cause of the collision, and the jury was warranted in drawing an inference of negligence on the part of the company as a matter of fact. We do not hold that negligence should be inferred as a presumption of law. *Young v. Bransford*, 12 Lea, 234.

This is a substantial statement of the facts attending the loss of plaintiff's property.

The assignments of error on behalf of the company are based upon the instructions of the trial judge to the jury and upon the refusal of the court to give certain supplemental requests.

The first assignment is that the court erred in giving the following instruction to the jury, viz.:

"While in this case the defendant railway company might make a contract that would exempt itself from liability for negligence as applicable to the mill building and contents, which it allowed the plaintiff to construct and operate upon its right of way, or ground belonging to the railroad company, . . . the contract entered into would be construed strictly, because it is derogatory of the general law upon that subject, and the limitations of that contract would be construed most

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strongly against the railroad claiming the benefit of it, and so would be extended, by implication of law, to include anything not expressly included by the contract itself. So, in construing this paper, I instruct you that, while the defendant railway company might claim the benefits, and are entitled to the benefits secured to it under this contract entered into and signed by both parties, still the clause, 'They will save and hold harmless the trustees of the Cincinnati Southern Railway and the said railway company from all damage that may arise from the destruction or injury of said stave mill and contents by fire, or from any cause whatever,' could not be construed to extend beyond the limitation expressly stipulated for in that contract. If you should find that the damage resulting to the plaintiff from this accident was done to the stave mill and contents, then I instruct you, under the contract, your verdict would be in favor of the defendant. But, if you shall find that the damages sued for in this case were not for injury done to the stave mill and contents, but were for damage done to the plaintiff by the burning up of staves that had been manufactured in his mill and were in a car standing on its side track, and other staves that had been manufactured and placed alongside of the track to be shipped off on defendant's road, and were for staves burned up which had been shipped in there on defendant's train and unloaded to be worked and dressed and then to be shipped off, if you should find that sort of injury, according to this contract, would not limit the liability of the defend-

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ant as to that character of damage, . . . I instruct you that he is entitled to recover."

Counsel for plaintiff in error, in order to present his contentions under a proper construction of the contract, submitted the following requests, which were declined by the trial judge, viz.:

"(1) If the plaintiff placed staves in the rough, which were to be worked up, on the railroad's right of way outside instead of in the mill, or under the shed of the mill, then such staves were, under the contract, and under the law, 'contents of the mill,' and being burned, he could not recover therefor.

"(2) 'Contents,' as used in this contract, include staves in the rough placed there to be worked up in the mill, whether stacked on the right of way under or outside of the mill shed.

"(3) If plaintiff had staves which had been worked up and dressed in the mill and were ready for sale and shipment, and plaintiff stacked or placed such staves outside of the mill instead of under the shed, then the plaintiff cannot recover therefor.

"(4) 'Contents,' as used in that contract, will also include dressed staves stacked or placed outside of the mill shed, as well as on the inside of the mill shed."

Recurring to the instructions given by the trial judge in his general charge, it will be remarked that he upheld the validity of the clause in the written lease providing for an exemption of the company from liability to the lessee for the loss of the mill and contents by fire, or

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from any cause whatever. It was contended on behalf of the plaintiff below that this stipulation was void, as against public policy, and the cases were cited holding that a common carrier may not limit its common-law liability as against acts of negligence on its part. It is to be observed, however, that in executing this contract the railroad company was not acting in its capacity as a common carrier, but simply as the owner and lessor of the premises. Nor was this contractual capacity at all affected by the clause appearing in the written lease and relied on by counsel for plaintiff below, viz.: "And to use the said stave mill as a place for manufacture, storage, and shipment upon the company's road."

So that it is apparent that the validity of this contract is not to be determined by the right of the railroad company to limit its common-law liability as a common carrier, but the right to make the contract as an ordinary owner of premises. What, then, is the law governing this situation of the parties and determining the measure of liability?

Says Mr. Elliott, in his work on Railroads (volume 3, section 1236) :

"So far as we have been able to discover, there are few cases in the books governing the validity of a contract exempting a railway from liability for negligently firing and burning property. We think that ordinarily a contract exempting a company from liability for negligently burning property not on the right of way or premises of the company would be held void. But where

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property is placed on a railway right of way by virtue of a contract in which the owner releases the railroad company from any and all liability on account of fire, and the property is afterwards destroyed by fire, negligently set by the railway company, the contract is not void, and the company cannot be held liable"—citing *Griswold v. Ill. Central R. R. Co.*, 90 Iowa, 265, 57 N. W., 843, 24 L. R. A., 647.

In the case of *Hartford Fire Ins. Co. v. Chicago, M. & St. P. Railroad Co.*, 175 U. S., 91, 20 Sup. Ct., 33, 44 L. Ed., 84, this question was elaborately considered.

Said the court:

"It is settled by the decisions of this court that a provision in a contract between a railroad corporation and the owner of goods received by it as a common carrier, that it shall not be liable to him for any loss or injury of the goods by the negligence of itself or its servants, is contrary to public policy, and must be held to be void in the courts of the United States, without regard to the decisions of the courts of the State in which the question arises. But the reasons on which those decisions are founded are that such a question is one of general mercantile law; that the liability of a common carrier is created by common law and not by contract, and that to use due care and diligence in carrying goods intrusted to him is an essential duty of his employment, which he cannot throw off; that a common carrier is under an obligation to the public to carry all goods offered to be carried within the scope and capacity of the business which

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he is holding himself out to the public as doing; and that, in making special contracts for the carriage of such goods, the carrier and the customer do not stand on equal terms."

The court continued:

"In the case at bar, no one had the right to put a warehouse or other building upon the land of the railroad company without its consent, and the corporation was under no obligation to the public or to the partnership to permit the latter to do so. In granting and receiving the license from the corporation to the partnership to place and maintain a cold storage warehouse upon a strip of such land by the side of the railroad track, and erecting the warehouse thereon, both parties knew that its proximity to the tracks must increase the risk of damages, whether by accident or by negligence, to the warehouse and its contents, by fire set by sparks from the locomotive engines or by trains or cars running off the track. The principal consideration embraced in their contract for the license to build and maintain the warehouse on this strip of land was the stipulation exempting the railroad company from liability to the licensee from any such damages, and the public had no interest in the question which of the parties to the contract should be ultimately responsible for such damages to property placed on the land of the corporation by its consent only."

The court concluded that the limitation expressed in the contract granting the license to erect and build on

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the right of way was in no way violative of the doctrine of public policy.

In the case of *Missouri, K. & T. Ry. Co. of Texas v. Carter* (Tex. Sup.), 68 S. W., 159, the court used this language:

"In some instances the courts have spoken upon the subject of contracts against the negligence of the contracting parties, as if there was a general rule of public policy which forbids persons to make contracts by which one would be exempt from or indemnified against the consequences of his own negligence or that of his servants or agents; but we have not been able to find any sound authority for any such proposition. In fact, the body of judicial decision establishes the contrary doctrine. For it is unquestionably true that, in matters of life, accident, and fire insurance, the contract is made with a view of indemnifying the insured party against the results of his own negligence as well as against the negligence of his servants. A railroad company, when not contracting in its character of common carrier, has the same right of contract as other corporations or persons, and in many instances may make contracts for immunity from liability on account of the negligence of its servants. . . . Likewise a railroad company may contract with an express company for exemption from liability for injuries to its goods or its agents in charge of them, although the injuries be caused by the negligence of its servants, because the contract of carriage is not that of a common carrier. Such

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a corporation may likewise by contract secure immunity from liability for damages caused by the negligence of its servants in operating locomotives whereby fire is set to property upon the right of way leased to persons for occupancy and the conduct of private business thereon" —citing *Griswold v. Railroad Co.*, 90 Iowa, 265, 57 N. W., 843, 24 L. R. A., 647; *Stevens v. Southern Pac. R. R. Co.*, 109 Cal., 86, 41 Pac., 783, 29 L. R. A., 751, 50 Am. St. Rep., 17.

The trial judge, as already stated, held that it was within the competency of these parties to execute the contract in question, containing the exemption clause, and in this instruction he was correct.

But the question remains whether the circuit judge was correct in his interpretation of that contract, and holding that it must be strictly construed and does not embrace any property on the right of way, unless it was actually within the mill and a part of its contents. Counsel for the plaintiff in error contends that the court confined his charge too strictly to the literalism of the contract and thereby ignored the intention of the parties, which is recognized to be the cardinal and governing rule for the construction of contracts.

The insistence on behalf of the company is that the object of the plaintiff below in erecting a mill on the right of way was to establish a plant for the manufacture of staves, and that rough material stored on the right of way to be run through the mill, and likewise the dressed

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staves which had already passed through it together with those which had been prepared for shipment, all of which were on the right of way in close proximity to the mill, were as a matter of law embraced within the designation of "the mill and its contents."

It is insisted further that the clear intention of the parties was to exempt the railroad company from liability for the loss of this stave plant, consisting of the building, machinery, and material. We are constrained to hold that such is the proper construction of this contract. Under the express language of this written lease, the stave mill was to be used as a "place of manufacture, storage and shipment," and, in view of the size of this mill, as shown by the proof, it was never contemplated that its operation should be confined strictly to the building, but it was necessary that a part of the right of way should be used for rough material as it might be received, and another portion for the product of the mill as it might be turned out ready for shipment; and such was the practical construction of this contract by the parties themselves during the continuance of this lease. It is, moreover, a principle of construction that, where a man grants a thing, he grants with it everything necessary to its enjoyment. Easements necessary for the enjoyment of a grant of land are created *ex necessitate*, and pass by the grant, although not expressly named. 14 Ency. of Law, 1166.

It is perfectly apparent from the record that, without the right of storage on the company's right of way, near

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the track, the business of Saulsbury & Co. could not have been carried on, since the mill erected by them, with the consent of the company, was too small for the accommodation of its working material. This fact was known to the company, and no objection interposed by it at any time to the storage of material on its right of way. So that in our opinion all the staves on the right of way appurtenant to the mill should fall under the designation of "mill and its contents," and the company is not liable for their destruction "by fire or from any cause whatever." We are of opinion, however, that the company is liable as a common carrier for the staves loaded into the freight car and which were ready for shipment. This is practically conceded by counsel for the company in the brief. Unless, therefore, there is a remittitur of all the damages except the value of the car load of staves, the judgment will be reversed, and the cause remanded.

Frazier v. Telephone Co.

S. J. A. FRAZIER *et ux. v.* EAST TENNESSEE TELEPHONE
COMPANY.*

(*Knoxville*. September Term, 1905.)

EMINENT DOMAIN. Telephone poles and wires in streets are not an additional burden entitling abutting owner of fee to compensation.

Telephone poles erected in the public streets and the wires strung thereon for use in the operation of a public telephone system do not constitute such additional burden upon the fee of the abutting owners as entitles them to compensation.

Cases cited and approved: *Smith v. Railroad*, 87 Tenn., 626; *Telegraph & Telephone Co. v. Railroad*, 93 Tenn., 492, 503.

Cases cited, distinguished, and approved: *Railroad v. Bingham*, 87 Tenn., 522; *Smith v. Railroad*, 87 Tenn., 633; *Railroad v. Doyle*, 88 Tenn., 747.

For the cases cited by the counsel of each side, see pages 419-421.

FROM HAMILTON.

Appeal from the Chancery Court of Hamilton County.—D. L. LANSDEN, Chancellor.

MR. JUSTICE NEIL made a statement of the facts as follows:

The question to be determined in this case arises upon the following statement of facts, which we adopt from the findings of the court of chancery appeals, viz.:

*As to the question whether telegraph or telephone poles are an additional burden on the highway, see note to *People v. Eaton* (Mich.), 24 L. R. A., 721.

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"Some 20 or more years ago complainants, husband and wife, bought a tract of some seventy acres of land on the north side of the Tennessee river opposite Chattanooga. The title to this land was taken in them jointly. They platted a portion of this land into blocks, streets, and alleys, and called the land so platted and divided into streets, 'Frazier Addition.'

"This plat was made a matter of public record.

"Two of the main streets in said addition are called and known as Forest avenue and Frazier avenue.

"Complainants sold some lots in said addition with reference to its streets, and they built a residence for themselves abutting on Frazier avenue, in which they have lived.

"The defendant is a telephone company, chartered under the laws of Kentucky, and organized to furnish telephone service to the public. It has, and has had, for years, a telephone exchange in Chattanooga, and through and by the use of its equipment it gives local and long distance telephone service to the public. As a means of furnishing this service, it erects poles planted in the ground, to which it attaches wires reaching the points and patrons calling for its service.

"Some years ago, but after complainants platted their land as aforesaid, the county of Hamilton, in which is situate Chattanooga, constructed a bridge across the Tennessee river for the use of the public.

"The northern terminus of this bridge, or its northern end, extends, after crossing the bed of the river, some

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distance up Forest avenue. This location of said end of the bridge on a part of said avenue was with the assent of complainants.

"As this bridge blocked to a great extent the south end of said avenue for the distance it extends along it, complainants widened said avenue along the east side of the bridge, so as to allow free access to the river, and to their bottom land immediately adjacent to the river at that point.

"The defendant, with its wires, crossed the river along said bridge, and, on reaching the north bank of the river, erected its poles on the passageway opened as aforesaid by complainants on the east side of said bridge and strung its wires thereon.

"It also erected its poles and strung its wires along or on Forest and Frazier avenues to reach and serve its patrons on that side of the river.

"The poles thus erected by it had cross-arms fastened to them, to which its wires were attached, and some of them were braced by stay poles.

"The complainants, in platting their land into lots, streets, etc., retained the fee to the land covered by the streets, and simply dedicated them to the public use as an easement way of travel.

"Under the evidence in the record, the defendant planted its telephone poles along Frazier and Forest avenues and attached its telephone wires to cross-arms fastened to said poles, and used and is using them in the operation of its business."

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Section 1830 of Shannon's Code provides, among other things that telephone companies may construct and maintain lines over the public highways and streets of the State.

BURKETT, MILLER & MANSFIELD, for complainants.

WATKINS & THOMPSON and W. L. GRANBERY, for defendant.

MR. JUSTICE NEIL, after making the foregoing statement of facts, delivered the opinion of the Court.

The question arising on the foregoing facts is whether telephone poles and wires constitute an additional burden upon complainants' fee for which they are entitled to compensation.

In support of the liability, the following cases and text-writers are cited by complainants' counsel, viz.: *Eels v. Tel. Co.*, 143 N. Y., 133, 38 N. E., 202, 25 L. R. A., 640; *Tel. Co. v. Barnett*, 107 Ill., 507, 47 Am. Rep., 453; *Tel. Co. v. Eaton*, 170 Ill., 513, 49 N. E., 365, 39 L. R. A., 722, 62 Am. St. Rep., 390; *Daily v. State*, 51 Ohio St., 348, 37 N. E., 710, 24 L. R. A., 724, 46 Am. St. Rep., 578; *Callen v. Electric Light Co.*, 66 Ohio St., 166, 64 N. E., 141, 58 L. R. A., 782; *Tel. Co. v. Williams*, 86 Va., 696, 11 S. E., 106, 8 L. R. A., 429, 19 Am. St. Rep., 908; *Krueger v. Tel. Co.*, 106 Wis., 96, 81 N. W., 1041, 50 L. R. A., 298; *Stowers v. Tel. Co.*, 68 Miss., 559, 9 South.,

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356, 12 L. R. A., 864, 24 Am. St. Rep., 290; *Tel. Co. v. McKenzie*, 74 Md., 36, 21 Atl., 690, 28 Am. St. Rep., 219; *Nicoll v. Tel. Co.*, 62 N. J. Law, 733, 42 Atl., 583, 72 Am. St. Rep., 666; *Donovan v. Allert*, 11 N. D., 289, 91 N. W., 441, 58 L. R. A., 775, 95 Am. St. Rep., 720; *City of Spokane v. Colby*, 16 Wash., 610, 48 Pac., 248; *Bronson v. Tel. Co.*, 67 Neb., —, 93 N. W., 201, 60 L. R. A., 427; *Pac. Postal Tel. Cable Co. v. Irvine* (C. C.), 49 Fed., 113; *Post. Tel. Cable Co. v. Sou. Ry. Co.* (C. C.), 89 Fed., 190; *Kester v. W. U. Tel. Co.* (C. C.), 108 Fed., 926; Joyce on Electrical Law, sec. 321; 2 Dill. Munic. Corp. (5 Ed.), sec. 698a; Elliott on Roads and Streets, 534; Lewis on Eminent Domain, sec. 131; Crosswell on El., sec. 110; Randolph on Em. Domain, sec. 407.

For the defendant the following authorities are cited, viz.: *McCann v. Tel. Co.*, 69 Kan., 210, 76 Pac., 870, 66 L. R. A., 171; *Magee v. Overshiner*, 150 Ind., 127, 49 N. E., 951, 40 L. R. A., 370, 65 Am. St. Rep., 358; *Coburn v. New Tel. Co.* (Ind.), 59 N. E., 324, 52 L. R. A., 671; *Irwin v. Great Sou. Tel. Co.*, 37 La. Ann., 63; *Pierce v. Drew*, 136 Mass., 75, 49 Am. Rep., 7; *People v. Eaton*, 100 Mich., 208, 59 N. W., 145, 24 L. R. A., 721; *Cater v. N. W. Tel. Co.* (Minn.), 63 N. W., 111, 28 L. R. A., 310, 51 Am. St. Rep., 543; *Julia B. & L. Ass'n v. Bell Tel. Co.*, 88 Mo., 258, 57 Am. Rep., 398; *Hershfield v. Rocky Mt. Tel. Co.*, 12 Mont., 102, 29 Pac., 883; *York Tel. Co. v. Keesey*, 5 Pa. Dist. R., 366; *Lockhart v. Craig St. Railroad*, 139 Pa., 419, 21 Atl., 26; *Kirby v. Citizens' Tel. Co.* (S. D.), 97 N. W., 3; *Southern Bell Tel. Co. v.*

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Francis, 109 Ala., 224, 19 South., 1, 31 L. R. A., 193, 55 Am. St. Rep., 930; *Cumberland T. & T. Co. v. Avritt* (Ky.), 85 S. W., 204; *Lowther v. Bridgeman* (W. Va.), 50 S. E., 410.

Some other cases upon both sides of the question may be found in the citations contained in the opinions of the judges in the cases above referred to, and in the foot-notes, and also in the notes to 27 Am. and Eng. Encyc. Law, pp. 1008, 1009; but in those which we have cited will be found a full and satisfactory presentation of every consideration properly entering into the inquiry.

It is obvious upon a mere casual inspection, even, that the numerical weight of authority supports the complainants' contention. The question is to be determined, however, not by numbers merely, but upon what shall appear to us the best reasons.

The case is of first impression here. It has been held by this court that steam railways, both the ordinary commercial (*Railroad v. Bingham*, 87 Tenn., 522, 11 S. W., 705; *Smith v. Railroad*, 87 Tenn., 633, 11 S. W., 709) and dummy lines (*Street Ry. Co. v. Doyle*, 88 Tenn., 747, 13 S. W., 936, 9 L. R. A., 100, 17 Am. St. Rep., 933), constitute an additional burden, but that street railways (*Smith v. Street R.*, 87 Tenn., 626, 11 S. W., 709; *Telegraph & Telephone Co. v. Elec. Ry. Co.*, 93 Tenn., 492, 503, 29 S. W., 104) do not; and it is held generally in the courts of the country that electric light poles and wires, gas pipes, and lamps posts for highway purposes, sewer pipes, and water pipes, do not.

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On one side, the theory is that a proper street purpose can only be something connected with the use of the street as a passway, for moving objects, people, animals, and vehicles, or with the maintenance of ingress and egress, to and from the houses upon the street, and the passage of light and air. Under this theory it is admitted that the use of the street cannot be confined to merely old and accustomed forms of transit, but that all new forms and methods of conveyance may be employed, not inconsistent with the reasonably comfortable and safe use of the street by all; commercial railways and dummy lines being excluded from classification for street purposes, on the ground of their noise, bulk, and danger, and the unavoidable inconvenience and interruption to other kinds of use, that their presence produces. Bicycles and automobiles are of course permitted, as constituting improved modes of convenience. Street cars are permitted for the same reason, and their poles and wires as necessary adjuncts; electric light lines, and gas pipes and lamp posts, because they are used in lighting the street, and, so, in making it comfortable and safe for passage at night; sewer pipes, because they are useful in draining the street of surplus water, and so preserving it, and likewise making it more convenient for use; water pipes, because the water must be used for sprinkling the street in dry weather, and also for cleansing it. It is said that the telephone does not fall within any of the foregoing classifications, but that it is an entirely new and foreign use, and so constitutes an additional burden.

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On the other side, it is said that in the widest, and, likewise, the most correct sense, a street is a means of intercommunication between the people of a city, for traffic, and for the conduct of personal and social intercourse, and also for the convenient use of dwellings and business houses abutting thereon; that its primary purpose is for passage, it is true, but that such passage need not be, alone, that of people, animals, or wheeled conveyances, or of things that run upon the ground; that a message sent through the air upon electric wires, over the street, takes the place of one sent by a man or boy walking, or upon horseback, or conveyed by a vehicle, along the street; that not only is the same service performed by the telephone, but in a manner far better, and more quickly; that if the thousands of messages which go over such wires in a single day had to be conveyed by men or vehicles, or both, the streets would be far more thronged than they now are, and hence rendered less comfortable, and less safe for use, and that in the course of a few months, or a year's time, the difference in the wear and tear of the streets would be very perceptible, because of such increased use; that the telephone is therefore but an improved method of subjecting the streets of a city to an old use, and that the poles and wires are just as necessary adjuncts to this new method as are the poles and wires of a street railway or an electric light plant, erected in substantially the same manner, and no more obstructive.

To this latter view, it is replied that the same course

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of reasoning would justify the erection of a Marconi wireless plant in a city street, since this also transmits intelligence; but to this suggestion it is returned that the bulk of such a plant, and the noises necessarily attendant upon its operation would make its use impossible in such a situation, in addition to the cardinal fact that wireless messages are not used by the people of a city in communicating with each other within the city, but that such instruments are only for long distance communication.

We are of the opinion that the second view is the sounder one.

When land has been dedicated or condemned for street purposes, the city has the right not only to use the surface of the ground, but also may go beneath the surface, or above it, so far as may be necessary to adapt to its proper use the land so devoted to the service of the public. We approve the authorities which hold that the chief purpose of a street is that of intercommunication between the inhabitants or denizens of a city or town and that the telephone is but a new and improved method of affecting this purpose, and hence not a new burden upon the fee of the abutting owner. If this instrument of a larger and more generous civilization were destroyed, not only would social intercourse be very greatly restricted, but the progress of all business would be retarded and its development confined within much narrower limits than now. Friends desiring to converse with each other, whether in near or remote

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parts of the city would find it necessary to leave their own houses, and proceed along one or more streets to the home of the person with whom they desired to talk, and thus consume an hour or hours in doing what may now be accomplished within a few minutes. So, of the housewife in sending orders, or directing orders, to merchants for the purchase of goods necessary for the daily conduct of the home; and so in a larger way of the countless affairs of business, by men of business, in the daily life of the world. Houses are built upon streets, and people live in them, and work in them, and the telephone must go along the street, and must enter these houses from the street, in order to be of any use at all. It must follow the street with more regularity than even sewer pipes or water pipes, and like these, must go into houses from the street in order to serve the purpose for which it was designed. It is thus distinctly an apparatus for the street, and from the street enters the houses and places of business of the denizens of a city, and as truly unites its people as do the streets themselves; and, indeed, in a more real, or at least a more intimate, way, since it renders possible an almost instant mental contact, so to speak, between all the people who make the aggregate of the city's population, its wires being, as it were, the city's nerves.

For the reasons stated, we are of the opinion that the court of chancery appeals erred in rendering a decree in favor of the complainants.

The decree of that court must therefore be reversed;

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but the cause will be remanded to that court to the end that it may make a suitable finding upon the matters embraced in complainants' requests for additional findings of fact upon the subject of an unreasonable use by the defendant of its right to place its poles and wires upon the streets, etc., referred to, and any other facts that will throw light upon this inquiry, and to the end that that court may dispose of this branch of the case, after eliminating from its consideration the question above discussed and settled.

SHIELDS, J., is of the opinion that the authorities first cited present the sounder view, that telephone poles and wires do constitute an additional burden upon the fee, and he therefore dissents.

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(Knoxville. September Term, 1905.)

1. **STATUTE.** Words to be taken in their natural and ordinary sense, when.

As a general rule, the words of a statute, if of common use, are to be taken in their natural and ordinary sense, and without any forced or subtle construction to extend their meaning. (*Post*, p. 436.)

Case cited and approved: State, ex rel., v. Turnpike Co., 2 Sneed, 90.

2. **PHYSICIANS.** One diagnosing diseases by microscopic examination of blood, and treating patients with electric arc lights, is not an optician, when.

One who makes microscopic examinations of the blood taken from his patients in his diagnoses of their disease, and treats them by placing them under the rays of electric arc lights of a certain kind, and also writes prescriptions and prescribes remedies, though no charge is made for prescriptions, is not an optician, within the sense of the statute (Acts 1901, ch. 78) excepting opticians from its provisions requiring license to practice medicine. (*Post*, pp. 429-437.)

Acts cited and construed: 1901, ch. 78, secs. 1, 18, and 19.

3. **SAME.** Same. One is engaged in the practice of medicine in the sense of the statute prohibiting the same without a license, when.

One who makes microscopic examinations of the blood taken from his patients in his diagnoses of their diseases, and treats them by placing them under the rays of electric arc lights of a certain kind, and also writes prescriptions and prescribes remedies, though no charge is made for prescriptions, is engaged in the practice of medicine, within the sense of the

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statute (Acts 1901, ch. 78), prohibiting the practice of medicine without a prescribed license, and providing that any person shall be regarded as practicing medicine who shall treat, or profess to treat, operate on, or prescribe for any physical ailment of another. (*Post*, pp. 432, 437-441.)

Acts cited and construed: 1901, ch. 78, secs. 1, 18, and 19.

Cases cited and approved: *Payne v. State*, 112 Tenn., 588; *Bibber v. Simpson*, 59 Me., 181; *People v. Phippin*, 70 Mich., 6; *Parks v. State*, 159 Ind., 211; *State v. Van Doran*, 109 N. C., 867.

4. **SAME. Same. Same. Statute requiring a prescribed license for the practice of medicine is constitutional and valid.**

The statute prohibiting the practice of medicine without a prescribed license, and defining what is the practice of medicine within the meaning of the statute, is constitutional and valid. (*Post*, pp. 429, 441-443.)

Acts cited and construed: 1901, ch. 78.

Cases cited and approved: *State v. Heath*, 125 Iowa, 585; *Slaughter House Cases*, 16 Wall., 36; *Virginia, Ex parte*, 100 U. S., 339; *Holden v. Hardie*, 169 U. S., 366; *State v. Edmunds (Iowa)*, 101 N. W., 431.

FROM HAMILTON.

Appeal from the Criminal Court of Hamilton County.—M. M. ALLISON, Judge.

PRITCHARD & SIZEB, for O'Neil.

ATTORNEY-GENERAL CATES, BROWN & SPURLOCK, and H. P. FRY, for State.

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MR. JUSTICE M'ALISTER delivered the opinion of the Court.

The plaintiff in error was convicted of practicing medicine and surgery in the county of Hamilton without having first procured a certificate of license from the State board of medical examiners, as required by chapter 78, Acts of the general assembly of the State of Tennessee, entitled "An act to regulate the practice of medicine and surgery in the State of Tennessee, and to define and punish offenses committed in violation of this act," etc. Acts 1901, p. 115, c. 78.

The court thereupon assessed a fine of \$25, together with the costs of the case, against the defendant, from which judgment he appealed, and has assigned errors.

The plaintiff in error relies on two assignments of error for a reversal of the judgment below, which are as follows: (1) That his professional business is not within the purview of the statute, for the reason that he is an optician within one of the two recognized definitions of that term, and is therefore expressly excepted from the operation of the statute. (2) Conceding that his business is comprehended by the statute, as applied to him, said statute is unconstitutional for two reasons: First. His method of practice is not such as it is within the power of the legislature to regulate, restrict, or prohibit. Second. The regulation and requirements of the act, as applied to his methods of practice, are arbitrary and unjust, because his business does not re-

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quire the qualifications prescribed by the statute for those undertaking to practice medicine and surgery.

The facts presented on the trial of the case in the court below are practically undisputed and embrace the following salient points: The plaintiff in error opened up an office in the city of Chattanooga, with all the arrangements necessary for the treatment of his patients. According to the testimony, the plaintiff in error would first subject his patients to a careful examination, including a microscopic test of a drop of blood taken from some part of the patient's body. He would then determine, from his diagnosis, the nature of the patient's ailment and whether or not it would require his treatment.

It is shown in the record that the method of treatment is practically uniform in all cases. "The patient is denuded of clothing and placed in a closed cabinet, and his body is thereupon subjected to the rays of two large electric arc lights, one being located in front of his body, and one at the back. This treatment is continued for about thirty minutes at each sitting, and then the patient, who is by this time in a profuse perspiration, is taken into another room and rubbed off, after which he goes about his business. In addition to this general treatment, a local application of the rays to the parts specially affected is made in some cases."

In addition to prescribing the light treatment as the means of treatment for his patients, the defendant gave medicines of various kinds, kept an account at a drug store where medicines were purchased, gave prescrip-

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tions in the form of orders on the store of R. J. Miller, advised several of his patients to take certain patent medicines as an auxiliary to his treatment, and was addressed and known as Dr. O'Neil.

The record shows that defendant was accustomed to make a uniform charge of \$100 in each case, for the application of the light treatment, but made no charge for medicines prescribed; hence he claimed that prescriptions were no part of his treatment.

Defendant did not deny that he had held himself out to the world as professing to treat disease, and it was not denied that defendant was practicing his profession without having received a license from the State board of medical examiners.

The plaintiff in error denominated his treatment as "the functional ray treatment." The philosophy of his treatment, as formulated by his counsel, is that the green and yellow rays of the spectrum possess in a greater degree than the other rays the power of building up and strengthening the tissues of the body and stimulating inactive organs by acting directly on the blood. He claims that by the use of chemicals he manufactures a carbon, the burning of which produces a light in which the yellow and green rays predominate, and from which the violet and ultra-violet rays, which are destructive to the tissues, are largely eliminated. "And it is a fact," continues the learned counsel, "well recognized among scientific men, that the application of such a light, in a certain class of diseases, and especially in

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some that cannot be reached by ordinary medical methods, is highly beneficial."

It is claimed that the defendant's method of treatment differs from that of the ordinary physician, in that it is a light treatment exclusively, and the other doctors in Chattanooga have never used any method of light treatment except the "Finsen or X-Rays, the violet, germ-destroyer rays."

The question then propounded on the record is whether these facts bring the defendant's business within the purview of chapter 78, page 115, Acts 1901. The first section of that act provides that "no person shall practice medicine, in any of its departments, within this State, unless and until such person shall have obtained a certificate of license from the State board of medical examiners," created by the act. The eighteenth section imposes a fine of not less than \$10 nor more than \$25 on any person practicing medicine or surgery in the State without having complied with the requirements of the act. Section 19 is as follows: "That any person shall be regarded as practicing medicine within the meaning of this act, who shall treat, or profess to treat, operate on, or prescribe for any physical ailment, or any physical injury to, or deformity of another: Providing that nothing in this section shall be construed to apply to . . . veterinary surgeons, or osteopaths, not giving or using medicine in their practice, or to opticians, or to Christian scientists."

As already stated, the plaintiff in error claimed that

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his business came within the term "optician," specially excluded from the operation of the act. On this subject, the court charged the jury that "an optician is a maker of optical instruments, and applies to a man that fits glasses to the eye."

The court then stated it was not necessary to charge the jury further on the question of "an optician, because the facts don't justify it."

The court further instructed the jury as follows: "If you find that this defendant opened an office in the city of Chattanooga, and that parties . . . went to him for consultation or advice, that he made an examination of them, . . . that he diagnosed their case, stated what was wrong with them, and then prescribed for and treated them—in other words, if he stated he could cure them with his 'functional ray treatment,' and that he placed them in a cabinet, and turned lights on them, and incidentally prescribed medicine and treated them in this way for their ailments—then the court charges you, . . . that he would come within the purview of this statute, and would be guilty under the law."

After the delivery of the general charge, counsel for the defendant submitted four requests for additional instructions, all of which were declined by the court.

The substance of the first two requests was that if the recommendation and administration of laxative and other similar remedies, by defendant, was only occasional and incidental, and not a part of his regular course of treatment, and no charge was made therefor,

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this would not of itself constitute practicing medicine within the meaning of the statute.

The third request was as follows: "If the defendant's method of treatment is based entirely on the principles of the science of light, then he would be an optician, within one of the definitions of that term, and would be excepted from the operation of the statute."

The jury, after being in consultation for some time, returned into the room, and one of the jurors stated to the court "that some of their number would like to be instructed as to the meaning or construction of the words 'practicing medicine.' They want to know whether putting a patient into this device and applying the light to him would be construed as practicing medicine within the purview of this statute." Thereupon the court instructed the jury that "if the defendant made an examination of his patients, taking blood from the ear, and making a microscopical examination of the blood, and pronouncing what was wrong with him, and then treated him, by putting him in the cabinet and turning the lights on him, and attempting to perfect a cure in that way, that that would be such treatment as comes within the purview of this statute."

The first contention on behalf of the defendant is that he is an optician within the proviso of the statute, and counsel cite the Standard Dictionary as showing two recognized definitions of the term "optician:" (1) One who makes or deals in optical instruments or eye-glasses; (2) One who is versed in optics. The term

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"optics," as defined by the Standard Dictionary, is "the science that treats of light and vision, the organs of sight, chromatics, and all that is connected with the phenomena of sight. It includes: (1) Geometrical optics; (2) physical optics, embracing (a) the undulatory theory, and the effects explained by it, as polarization, refraction, and interference; and (b) electro-optics, treating of the mutual relations of light and electricity; and (3) physiological optics, treating of such phenomena as depends on bodily function or brain action.

As already seen, the trial judge instructed the jury that defendant would not come within the term "optician" unless he made optical instruments, and declined to instruct the jury that defendant would be an optician if his method of treatment is based entirely on the principles of the science of light. It is insisted on behalf of the plaintiff in error that he is entitled to the benefit of this proviso, if his business or profession comes within either of the authorized definitions of the word "optician." And it is suggested, moreover, that it is not at all probable that the legislature, in this proviso intended to apply the term "optician" to makers of optical instruments, "since such a person neither treats, nor professes to treat, operates on, or prescribes for any physical ailment, or any physical injury to or deformity of another." And hence this general language would not have covered a mere maker of optical instruments. In other words, it is insisted that, under the charge of the trial judge, the exception in favor of "optician" is en-

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tirely meaningless and inoperative; for the statute, without the exception, would not have applied to a "mere maker of optical instruments." It is contended, however, that one who treats or professes to treat disease by the operation of the principles of the science of light would fall within the general language of the section in question, but would be exempted from its operation by virtue of the proviso.

But it must be conceded that the definition of an optician given by the circuit judge is the common understanding of that term in practical life. He is usually understood to be a person who manufactures, sells, repairs, and dispenses instruments for the strengthening and preservation of the human eye, and who does not treat disease or operate surgically.

"It is a general rule that the words of a statute, if of common use, are to be taken in their natural and ordinary sense, and without any force or subtle construction to extend their meaning." *State, ex rel., v. Turnpike Co.*, 2 Sneed, 90.

"The rule of construction is that words are to be construed according to their natural meaning, unless such a construction would render them senseless, or would be opposed to the general scope and intent of the instrument, or unless there be some very cogent reason of convenience in favor of a different interpretation."

"Where a word has both a popular and a technical meaning, the court will give it effect according to the popular signification."

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"The courts approach the interpretation of a statute with the presumption that the words and phrases therein are used in their familiar and popular sense, and without any forced, technical, or subtle construction to limit or extend their meaning." Amer. and Eng. Ency. of Law, "Statutes."

Moreover, the proof in this record shows that plaintiff in error makes a microscopic examination of the blood in his diagnosis of disease, and also writes prescriptions and prescribes remedies, although it must be admitted that his principal mode of treatment is by the "functional ray." So that the plaintiff in error cannot claim that exemption, even under the very technical definition of an optician which he has invoked in this record.

The next question that arises is whether the court was correct in his response to the query propounded by one of the jurors to the effect that:

"If the defendant made an examination of his patients, taking blood from the ear and making a microscopic examination of the blood and pronouncing what was wrong with him, and then treated him by putting him in the cabinet and turning the lights on him and attempting to perfect a cure in that way, that would be such treatment as comes within the purview of this statute."

It will be remarked that the statute provides that:

"Any person shall be regarded as practicing medicine within the meaning of the act, who shall treat or profess to treat operate on or prescribe for any physical ail-

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ment, or any physical injury to or deformity of another."

It is insisted by the State that defendant's conduct in first holding himself out as a healer of disease, receiving patients ascertaining what were the symptoms of their disease, directing as a remedy the light treatment supplemented by medicines, for all of which the defendant charged a fee, pursuing the business as a profession, was in direct contravention of the statute.

In the case of *Payne v. State*, 112 Tenn., 588, 79 S. W., 1025, it appeared that the plaintiff in error was engaged in advertising a patent medicine by making a speech or harangue to a crowd assembled in the open air. He said to the crowd that if anybody with a stiff neck or joint, headache, or rheumatism, or neuralgia, or a stiff hand would come on the stage, he would guarantee to cure him in five minutes with his liniment. People would accordingly go up to the stage, and the plaintiff in error would rub liniment on such as came, for the purpose of relieving the stiff neck or stiff hand, as the case might be. Again, plaintiff in error told another person that his medicine was good for stomach trouble and nervousness, and thereupon sold the patient a bottle of his medicine. He further stated that the directions were on the bottle, and the patient could increase or diminish the dose as his case might require. He also instructed the patient that it would benefit him to take a cold bath every morning, and that his diet should be eggs, buttermilk, and corn bread. The court held that these facts constituted

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practicing medicine within the meaning of the act, and affirmed a judgment of conviction against the plaintiff in error for a violation of the statute. It was further said in that case that the term "practicing," in respect to the subject in connection with which it was used, indicates the pursuit of a business.

In the case of *Bibber v. Simpson*, 59 Me., 181, the court gave the following definition of what constitutes practicing medicine, viz.:

"The plaintiff was a clairvoyant. When asked to examine a patient, she saw the disease and felt as the patient did; gave sittings; did not pretend to understand anatomy or medicine; that she was requested to visit the intestate and render him professional services and did so that she helped him. The service was medical in its character. True, the plaintiff does not call herself a physician; but she visits her sick patients, examines their condition, determines the nature of the disease, and prescribes the remedies deemed by her most appropriate. Whether the plaintiff calls herself a medical clairvoyant or a clairvoyant physician, or a clear-seeing physician, matters little."

In the case of *People v. Phippin*, 70 Mich., 6, 37 N. W., 888, it appeared that the defendant was convicted in the lower court of practicing medicine without a license; the proof showing that he kept an office had a sign over his door with the words thereon, "Dr. Phippin, Magnetic Healer." Several parties visited him as a magnetic healer, and he treated them, and held himself out

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to the community as a healer, and followed healing as a business. The supreme court of Michigan, in affirming the judgment of the court below, said:

"There is no good reason why restraint should not be placed upon the practice of medicine, as well as upon the practice of law. The public are more concerned in this than in the practice of law, and persons who engage in this profession require a special education to qualify them to practice. The great majority of the public know little of the anatomy of the human system and the nature of the ills that human flesh is heir to, and there is no profession, no occupation or calling in which people may be more readily imposed upon by charlatans. It is, however, an every day occurrence that people who are afflicted with disease will purchase and swallow all sorts of nostrums, because some quack has recommended it. Before the passage of the act in question, the people had no protection against quacks." *Parks v. State*, 159 Ind., 211, 64 N. E., 862, 59 L. R. A., 190.

In *State v. Van Doran*, 109 N. C., 867, 14 S. E., 32, it was held:

"An unlicensed person claiming to be a healer of disease, and holding himself out to the world as such, after examining a patient who has asked his services, diagnosing the disease, fixing the amount of the price to be asked, and giving him a prescription, cannot evade the law by proving that the medicine was a proprietary remedy prepared and sold by him."

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In the American and English Encyclopaedia of Law, in the article on "Medicine," the following definition is given:

"The practice of medicine, as ordinarily or popularly understood, has relation to the art of preventing, curing, or alleviating disease or pain. It rests largely on a knowledge of anatomy, physiology, and hygiene. It requires a knowledge of disease, its anatomical and physiological features, and its causative relations. Particularly, it consists in the discovery of the cause and nature of disease, and the administration or the prescribing of treatment therefor."

It must be admitted that plaintiff in error, in the pursuit of his profession, has treated, professed to treat, operated on, and prescribed for the physical ailments and injuries of another with the intention of following same as a business. The determinative fact against the plaintiff in error on the record is that he is holding himself out to the world as a practitioner of the healing arts and is soliciting patients afflicted with disease for treatment.

The records show that plaintiff in error came to Chattanooga some time during the year 1904, and rented a suite of rooms in the Chamberlain Building. He displayed certain signs advertising his business, one of which was, "O'Neil Institute," and another was, "H. Gibson O'Neil, Physiological Chemist." It appears that he was usually known and addressed by his patients and others as Dr. O'Neil, although there is testimony in the

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record to the effect that on one or two occasions he objected to the title, saying he had "such a contempt for the medical profession." It further appears that the plaintiff in error sometimes visited patients who were too feeble to go to his office, and on one occasion he placed one of his cabinets at the home of a patient for the purpose of treating him.

In the case of *State v. Heath*, 125 Iowa, 585, 101 N. W., 429, the supreme court of Iowa, in upholding the medical act of that State said: "The power of the State to prescribe such restrictions and regulations in the practice of medicine as in the judgment of the legislature shall protect the people from the consequences of ignorance and incapacity, as well as deception and fraud, has been vindicated too often to require citation of authority. The statutes do not attempt to discriminate between different schools of medicine or systems for the cure of the sick. No method to heal the sick, no matter how occult, is prohibited. All that the law exacts is that, whatever the system, the practitioner shall be possessed of a certificate from the State board of medical examiners, and shall exercise such reasonable skill and care as are usually possessed by practitioners in good standing of that system in the vicinity in which they practice. This excludes no one from the profession, but requires all to attain reasonable proficiency in certain subjects essential to the appreciation of physical conditions to be affected by treatment. The object is not to make any particular mode of effecting a cure unlaw-

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ful, but simply to protect the public from empiricism. Often the individual suffers from want of proper attention, but in cases of contagious or infectious diseases, the entire community may be endangered. In no profession, occupation, or calling are the people more easily or more readily imposed upon. Surely it is not unreasonable to demand of every one who professes to treat disease some knowledge of the disease, its origin, its anatomical and physiological features, and its causative relations, and the effects of drugs. At any rate, the State, in order to guard the people, had the right to exact such knowledge."

"It is and has been a great question as to what extent must the individual right be subordinated to the public. There are a great many burdens imposed under the police power. Criminals are deprived of their liberty; implements of vice are destroyed; vice and barbarism are controlled; noxious trades are regulated and nuisances are suppressed; children are required to attend school, and the property of infants and persons *non compos* is placed in the control of others; the construction of buildings in populous neighborhoods is regulated; provision is made for the greater safety of passengers upon railways and steamboats; employers are required to provide safe places in which the work of their employees can be done; hours of work in employments deleterious to the health are limited; the employment of children in factories prohibited; pure food laws enacted; physicians, dentists, and druggists licensed; and so the list might be expanded by specific

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instances of authorities of legislative regulations enforcing the social compact for the protection of life, health, morals, property, and the general weal of the community." etc. *Slaughter House Cases*, 16 Wall., 36, 21 L. Ed., 394; 4 Blackstone's Commentaries, 162; *Holden v. Hardie*, 169 U. S., 366, 18 Sup. Ct., 383, 42 L. Ed., 780.

"Few professions require more careful preparations by one who seeks to enter it than medicine. It has to deal with those subtle and mysterious influences upon which life and health depend, and requires a knowledge, not only of the properties of vegetable and mineral substances, but of the human body in all its complicated forms and their relation to each other, as well as their influence on the mind. The physician must be able to detect readily the presence of disease and prescribe appropriate remedies for its removal. Every one may have occasion to consult him, but comparatively few can judge of the qualifications of learning and skill he possesses. Reliance must be placed upon the assurances given by his license, issued by an authority competent to judge in that respect, that he possesses the requisite qualifications." *Ex parte Virginia*, 100 U. S., 339, 25 L. Ed., 676.

"The practice of medicine is a mere privilege, on the exercise of which the State may impose such conditions as it deems best and advisable." *State v. Edmunds* (Iowa), 101 N. W., 431.

Without further discussion and citation of authorities, we are of opinion there was no error in the judgment, and the same is affirmed.

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J. T. WRIGHT *v.* W. H. CUNNINGHAM.

(*Knowville*. September Term, 1905.)

1. **STATUTES.** Words "this act" in an amending statute apply and have reference to the original statute as amended, and not to the amendment itself, when.

Where a statute so amends a former statute as to strike out a certain section thereof and to provide that "this act" shall only apply to such counties as may adopt the same by majority vote, the words "this act" apply and have reference to the original statute as amended, and not solely to the amendment itself. (*Post*, pp. 451, 452.)

Acts cited and construed: 1903, ch. 177; 1905, ch. 316.

2. **SAME.** Words supplied by intendment to express the evident and obvious intention, when; case in judgment.

Ambiguous or meaningless clauses in a statute may be rejected, or words supplied by intendment to express the obvious intention of the legislature; and, therefore, where a statute, amending a former statute so that it shall be in force only in counties adopting it by a majority vote, declares that "the ticket" to be used at elections to put the same in force "shall provide for those favoring the small stock law, 'For small stock law,' and those 'Against said law,'" there is evidently an omission, which will be supplied to make the statute read that "the ticket shall provide for those favoring the small stock law, 'For the small stock law,' and for those opposing the small stock law, 'Against the small stock law.'" (*Post*, pp. 452, 453.)

Acts cited and construed: 1903, ch. 177; 1905, ch. 316.

Case cited and approved: *Nichols v. Loyd*, 111 Tenn., 145.

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3. **SAME.** Statute, providing that a former statute shall be in force only upon a majority vote of counties, operates as amendment, not as a repeal of the former statute, when.

A statute amending a former statute by striking out a certain section thereof, but leaving the remainder of the body of the act as before, with a provision that the statute as so amended shall be in force only in such counties as shall adopt the same by a majority vote, operates as an amendment only, and not as a repeal of the former statute, if it be constitutional to make the operative effect of a statute depend upon the vote of the people to be affected thereby, which is denied as shown in the ninth headnote. (*Post*, pp. 451, 453, 454.)

Acts cited and construed: 1903, ch. 177; 1905, ch. 316.

4. **SAME.** Title of amendatory statute, reciting title or substance of amended statute, need not indicate character of amendment germane to the title of the amended statute.

The title of the amendatory statute, reciting the title or substance of the statute amended, need not in any way indicate the character of the amendment, where the amendment is germane to the subject of the original statute, and is embraced within the title of such amended statute; and, therefore, an amendatory statute, providing that the amended statute shall apply only to counties adopting it by a majority vote, is not invalid as containing a subject not expressed in its title, for such provision is germane to the title of the original statute, for the reason that the time when a statute shall go into effect must necessarily always be germane to its title and to all its contents. (*Post*, pp. 451, 454, 455.)

Acts cited and construed: 1903, ch. 177; 1905, ch. 316.

Cases cited and approved: *Hyman v. State*, 87 Tenn., 109-111; *Goodbar v. Memphis*, 113 Tenn., 20.

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5. **SAME.** Statute, amending a former statute by providing that it shall be operative only in counties adopting it by a majority vote, is not unconstitutional as suspending a general law, when.

A statute, amending a former statute by providing that it shall be operative only in counties adopting it by a majority vote, is not unconstitutional as suspending a general law, because if the mandatory statute be operative at all, it must take effect according to its purport as an amendment of the former statute; and in that case it is treated as if incorporated into the body of the original statute, and the two statutes from that time become one statute. (*Post*, pp. 451, 455, 456.)

Acts cited and construed: 1903, ch. 177; 1905, ch. 316.

Constitution cited and construed: Art. 11, sec. 8.

Case cited and approved: *Goodbar v. Memphis*, 113 Tenn., 20.

6. **SAME.** May be made to take effect in the future or upon a condition or contingency, when.

A statute perfect in form, with all the prerequisites and safeguards provided by the constitution for the enactment of laws complied with by the legislature in passing it, is a valid law, although the time of taking effect is postponed, or is made to depend upon some condition or contingency selected by the legislature, and not dependent upon the action or vote of the people or other power than that of the legislature whose intent must be expressed in the statute. (*Post*, pp. 457, 458.)

Constitution cited and construed: Art. 2, sec. 20.

Cases cited and approved: *State v. Railroad*, 16 Lea, 136; *State, ex rel., v. Trewhitt*, 113 Tenn., 561, 572, 573.

7. **SAME.** Legislative power of the legislature is unlimited except as restrained by State and federal constitutions.

The legislature of the State has all powers of legislation, except in so far as it may be restrained by the constitution of the State, or that of the United States, expressly or by necessary implication. (*Post*, pp. 465, 466.)

Case cited and approved: *Redistricting Cases*, 111 Tenn., 234, 291, 292.

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8. **SAME.** Legislative power cannot be delegated by the legislature, except in special instances specified in the constitution, or existing before it, and continued after it.

Legislative power cannot be delegated, except in those special instances in which the constitution itself authorizes such delegation (such as submitting the vote to the people of counties and cities loaning their credit or taking stock in corporations changing counties or their lines, or county seats, and amendments to the constitution), or those sanctioned by immemorial usage originating anterior to the constitution and continuing unquestioned thereunder (such as powers conferred upon municipal corporations in their charters and by statutes, and powers conferred upon the quarterly county courts for the management of local matters), but such latter powers originating before the constitution and continuing afterwards are to be delegated to the governing bodies of the municipal corporations or counties, and not directly to the people themselves, except the question of the acceptance, rejection, or surrender of municipal charters may be submitted to a vote of the people. (*Post*, pp. 464-478.)

Constitution cited and construed: Art. 1, sec. 23; art. 2, secs. 1, 2, 3, and 29; art. 11, sec. 3.

Cases cited and approved: *Maury Co. v. Lewis Co.*, 1 Swan, 236, 240; *Grant v. Lindsay*, 11 Heis., 666; *Brinkley v. State*, 108 Tenn., 475; *Redistricting Cases*, 111 Tenn., 253-257.

9. **SAME.** Effectiveness cannot be made dependent upon a popular vote, and a statute so providing is unconstitutional, when, with the special exceptions stated in the foregoing headnote, no legislative act can be so framed as that it must derive its efficacy from a popular vote, and a statute, providing that it shall be effective only in such counties as may adopt it by a majority vote of the legal voters, is unconstitutional and void. (*Post*, pp. 456-470.)

Acts cited and construed: 1903, ch. 177; 1905, ch. 316.

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Cases cited and approved: *Barto v. Himrod*, 8 N. Y., 483; *Paul v. Circuit Judge*, 50 N. J. Law, 585 (in dissenting opinion); *In re Municipal Suffrage to Women*, 160 Mass., 586; *State, ex rel., v. Forkner*, 94 Iowa, 1; *Ex parte Wall*, 48 Cal., 279; *Morford v. Unger*, 8 Iowa, 82; *Santo v. State*, 2 Iowa, 165; *State v. Beneke*, 9 Iowa, 203; *State v. Willcox*, 45 Mo., 458; *Gibson v. Mason*, 5 Nev., 283; *State v. Hayes*, 61 N. H., 264; *Thorne v. Cramer*, 15 Barb. (N. Y.), 112; *People v. Stout*, 23 Barb. (N. Y.), 349; *Parker v. Commissioners*, 6 Pa., 507; *Railroad v. Clinton*, 1 Ohio St., 77; *People v. Collins*, 3 Mich., 343.

Cases cited and disapproved: *State v. Parker*, 26 Vt., 357; *Smith v. Janesville*, 26 Wis., 291; *In re Richard Oliver*, 17 Wis., 681; *State, ex rel., v. O'Neill*, 24 Wis. 149.

FROM RHEA.

Appeal from the Circuit Court of Rhea County.—JOSEPH C. HIGGINS, Judge.

MR. JUSTICE NEIL made a statement of the case as follows:

This action was brought to recover only a small sum of money, \$2.50, the amount of damages claimed by the defendant for the keep of certain hogs which trespassed upon the land of the defendant; but it involves the constitutionality of an amendment to an act of the legislature, presently to be mentioned, of a very impor-

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tant character. The circuit judge held the amendment inoperative, and therefore decided the case against the plaintiff below, and he has appealed and assigned errors.

The original statute was chapter 177, p. 408, of the Acts of 1903, and is as follows: "An act to prohibit the running at large of hogs, sheep and goats in Tennessee, in counties having a population by the federal census of 1900, or any subsequent federal census of between fourteen thousand two hundred, and fifteen thousand, and fixing the penalty for violation of the same.

"Section 1. Be it enacted by the general assembly of the State of Tennessee, that it shall be hereafter unlawful for any owner of hogs, sheep, and goats, to allow same to run at large in counties of Tennessee, having a population by the federal census of 1900, or any subsequent federal census of between fourteen thousand two hundred and fifteen thousand.

"Sec. 2. Be it further enacted, that any damage done by said stock running at large shall constitute a lien upon said stock, and may be enforced by judgment and execution against the owner thereof before any justice of the peace of the counties to which this act may apply.

"Sec. 3. Be it further enacted, that any party upon whom such stock may trespass shall have the right to take up and confine said stock, giving same good feed and attention, and shall be entitled to reasonable compensation for same, and shall have a lien upon said stock for their keep.

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"Sec. 4. Be it further enacted, that any violation of the provisions of this act shall be declared a misdemeanor and punishable by a fine of not less than two nor more than five dollars.

"Sec. 5. Be it further enacted, that all laws and parts of laws in conflict with this act be and the same are hereby repealed, and that this act take effect on and after the first day of May, 1903, the public welfare requiring it."

Passed March 24, 1903.

Approved March 26, 1903.

The amending act is chapter 316, p. 670, of the Acts of 1905, and is as follows:

"An act to amend chapter 177 of the Acts of 1903, being an act to prohibit the running at large of hogs, sheep and goats in counties having a population by the federal census of 1900, or any subsequent federal census of between fourteen thousand two hundred and fifteen thousand, and fixing the penalty for the violation of same.

"Section 1. Be it enacted by the general assembly of the State of Tennessee, that chapter 177 of the published Acts of 1903 of Tennessee be so amended as to strike out section 2 and provide that this act shall only apply to such counties as may adopt the same by a majority vote of the legal voters of said county at a legal election held for said purpose by the commissioners of election: Provided further, that the tickets used in said election shall be in conformity of law, and in such districts where the Dortch law applies the tickets shall conform thereto.

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The tickets shall provide for those having the small stock law, 'for the small stock law' and those 'against said law.' The election commissioners, as in other elections, shall prepare the returns and declare the result, and all laws in conflict are hereby repealed."

Passed April 6, 1905.

Approved April 12th, 1905.

The population of Rhea county, by the federal census of 1900, was 14,318, and the act of 1903, therefore, applied to it.

D. L. SNODGRASS, B. G. M'KENZIE, and W. L. GIVENS,
for plaintiff.

V. C. ALLEN and BURKETT, MILLER, MANSFIELD &
SWOFFORD, for defendant.

MR. JUSTICE NEIL, after stating the case as aforesaid, delivered the opinion of the court.

1. It is insisted for the defendant that the expression "this act," appearing in the act of 1905, applies to that act itself, with the result that the effect of the amendment is made to depend upon the vote of such counties as may adopt it. This is an incorrect view. The expression quoted has reference to the act as amended.

2. It is insisted that the amendment is fatally obscure because, it contains the following sentence: "The ticket shall provide for those favoring the small stock law, 'for the small stock law' and those 'against said

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law.' Evidently there was an omission between the words "and" and "those" of the word "for," and after the word "those" an omission of the expression "opposing the small stock law." As thus corrected, the sentence would read: "The ticket shall provide for those favoring the small stock law, 'for the small stock law,' and for those opposing the small stock law, 'against the small stock law.' The word "said" in the expression "against said law," of course refers to the small stock law, and the intention of the act was that the ticket of those opposing the law should read "against the small stock law."

It is a well-known canon of construction that an ambiguous or meaningless clause in a statute may be rejected, or words supplied by intendment to express the obvious intention of the legislature. *Nichols & Sheperd Co. v. Loyd*, 111 Tenn., 145, 76 S. W., 911.

3. It is insisted that the effect of the act of 1905 was to repeal the act of 1903. It is said that, while purporting to amend the former act, the latter really repeals it. The argument in support of this proposition is that the act of 1905 converts the act of 1903 from one in operative effect to an act that does not take effect, except upon a contingency. While it is sometimes difficult to distinguish between an amendment and a repeal, we do not think that the present case presents an instance of such difficulty. The body of the act remains as before, with the exception of section 2, which is stricken out, and the effect of the second act is simply to convert the

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body of the first, with the exception stated, from a law immediately operative into one effective only upon its being adopted by the vote of the counties referred to in such latter act. We think that such a change may be made by way of amendment, if it be constitutional to make the operative effect of a statute depend upon the vote of the people to be affected thereby. The latter is a subject which will be presently considered.

4. It is insisted that the act of 1905 contains two subjects, and hence violates section 17 of article 2 of the constitution, which provides that: "No bill shall become a law which embraces more than one subject, that subject to be expressed in the title. All acts which repeal, revive, or amend former laws shall recite in their caption, or otherwise, the title or substance of the law repealed, revived or amended."

The objection made under this head is that the caption of the act of 1905 makes no mention of the election provided for in the body of the act; hence that the body is broader than the title. The rule upon this subject is stated in *Hyman v. State*, 87 Tenn., 109-111, 9 S. W., 372, 1 L. R. A., 497. Referring to the act under consideration in that case, the court said that the title to the amendatory act in no way indicated the character of the amendment beyond a correct recital of the title of the act amended. The court then continued: "It is not, however, important that the title of an amendatory act shall do more than recite the title or substance of the act amended, provided the amendment is germane to the

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subject of the original act and is embraced within the title of such amended act. In other words, if the title of the original act is sufficient to embrace the matter covered by the amendment, it is unnecessary that the title of the amendatory act should of itself be sufficient."

This rule was referred to and approved in the recent case of *Goodbar v. Memphis*, 113 Tenn., 20, 35, 81 S. W., 1061.

The question, then, to be determined is whether the provision in respect of the election mentioned in the act of 1905 are germane to the matters embraced under the caption of the act of 1903. If we assume that the act of 1903 might have been so framed under its caption as to provide that it should become operative upon the contingency of an election by the people, then the matter contained in the present amendment would be germane. We think it clear that, if such provisions in statutes are constitutional at all, the act of 1903 might have been so framed, since the time when an act shall go into effect must necessarily always be germane, not only to its title, but to all of its contents.

5. It is insisted that the act of 1905 suspends a general law for the benefit of particular individuals, contrary to const., art, 11, section 8, which provides: "The legislature shall have no power to suspend any general law for the benefit of any particular individual, nor to pass any law for the benefit of individuals inconsistent with the general laws of the land; nor to pass any law granting to any individual or individuals, rights, privi-

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leges, immunities, or exemptions other than such as may be, by the same law extended to any member of the community who may be able to bring himself within the provisions of such law."

It is not insisted in the brief of defendant's counsel that the act of 1903 is a partial law, but it is referred to and treated as a general law. The insistence is that the act of 1905 violates the section of the constitution last quoted, in that it suspends the said act of 1903. We are of opinion that this is a misconception of the meaning of the word "suspend," as used in the section of the constitution quoted. The act of 1905, if it be operative at all, must take effect according to its purport as an amendment of the former act. In that case it is treated as if incorporated into the body of the original act, and the two from that time become one act. *Goodbar v. Memphis*, 113 Tenn., 20, 81 S. W., 1061. It does not, therefore, purport to suspend the former act, but simply to amend it, and it cannot be held void as in violation of the section of the constitution just referred to, if its substance be proper matter for amendment, and we have already held that it is proper matter for amendment if it be constitutional to pass laws to take effect upon a contingency.

6. It is insisted that the act of 1905 cannot be treated, constitutionally, as an amendment to the act of 1903, inasmuch as, when the two acts are thus consolidated into one, the resultant law is made to depend for its opera-

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tive and effective potency upon a vote of the people. This is the chief question in the case, and the one which has been argued more extensively than any other.

There is no doubt that, if a statute be perfect in form when it leaves the hands of the legislature, that body, in passing it, having complied with all of the prerequisites and safeguards provided by the constitution for the enactment of laws, such statute is a valid law, even though it do not take effect immediately upon its passage. The constitution (article 2, section 20) provides that no general law "shall take effect until forty days after its passage, unless the same or the caption shall state that the public welfare requires that it should take effect sooner." And it has been held that the legislature may, by the terms of the act itself, postpone its taking effect to a period beyond the forty days even. *State, ex rel., v. Trewhitt*, 113 Tenn., 561, 572, 573, 82 S. W., 480. In such cases the instrument has, by the authority of the legislature, become an expression of the legislative will in the form of a rule of action prescribed for the regulation of the conduct and affairs of the people; but it is a part of the same expression that the people shall not be compelled or permitted to act thereunder until the expiration of a time fixed. It is tantamount to saying that on and after so many days from the passage of this act the rule of action shall be thus and thus. The statute is vitalized immediately upon full compliance by the legislature with the requirements of the constitution for the enacting of laws. This is one thing. The time

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when it shall be the duty of the people to comply with its provisions is another; the latter depending upon the terms of the act itself.

The act may provide upon its face that this duty of compliance may depend upon the happening of a condition or contingency. It has been so held in this State (*State v. T. C. I. & R. R. Co.*, 16 Lea, 136); and this rule is general.

The controversy in the authorities arises over the nature of the condition or contingency; specifically, whether a favorable vote of the people may be made the condition. On the one hand it is said that the event must be such as, in the judgment of the legislature, affects the question of the expediency of the law, and that upon this question the legislature must exercise its own judgment definitely and finally, and can appeal to no other man or men to judge for them. Per Ruggles, C. J., in *Barto v. Himrod*, 8 N. Y., 483, 59 Am. Dec., 506; Cooley, Const. Lim. (7th Ed.), 169. The point was thus put by Reed, J., in his dissenting opinion in *Paul v. Gloucester Co. Circuit Judge*, 50 N. J. Law, 585, 15 Atl., 272, 1 L. R. A., 86: "The difference between the statutes based upon a valid contingency and those based upon a contingency void as a delegation of legislative power may, I think, be clearly stated. The first is a statute ordaining a fixed rule of civil conduct applying to a certain prescribed condition of fact, which may arise *in futuro*. The last is a statute which leaves to the people the power to say whether, when such a rule has been enacted, it shall ever

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become operative. One leaves the rule a law ready to operate upon the subject-matter whenever it arises. The other leaves it to another to say whether the rule shall ever become a law." 15 Atl., 286, 1 L. R. A., 96. The opposite view is thus stated by Redfield, C. J., in *State v. Parker*, 26 Vt., 357: "If the operation of a law may fairly be made to depend upon a future contingency, then, in my apprehension, it makes no essential difference what is the nature of the contingency, so it be an equal and fair one, a moral and legal one, not opposed to sound policy, and so far connected with the object and purpose of the statute as not to be a mere idle and arbitrary one. . . . It seems to me that the distinction attempted between the contingency of a popular vote and other future contingencies is without all just foundation in sound policy or sound reasoning, and that it has too often been made more from necessity than choice, rather to escape from an overwhelming analogy than from any obvious difference in principle in the two classes of cases; for . . . one may find any number of cases in the legislation of congress where statutes have been made dependent upon the shifting character of the revenue laws, or the navigation laws, or commercial rules, edicts, or restrictions of other countries. In same, perhaps, those laws are made by representative bodies, or it may be by the people of these States, and in others by the lords of the treasury or the boards of trade, or by the proclamation of the sovereign; and in all these cases no question can be made of the perfect legality of

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our acts of congress being made dependent upon such contingencies. It is in fact the only possible mode of meeting them, unless congress is kept constantly in session. The same is true of acts of congress by which power is vested in the president to levy troops and draw money from the public treasury upon the contingency of a declaration or act of war, committed by some foreign State, kingdom, empire, prince, or potentate." In *Smith v. Janesville*, 26 Wis., 291, Dixon, C. J., states the matter as follows: "But it is said that the act is void, or at least so much of it as pertains to the taxation of shares in national banks, because it was submitted to a vote of the people, or provided that it should take effect only after approval by a majority of the electors voting on the subject at the next general election. This was no more than providing that the act should take effect on the happening of a certain future contingency; that contingency being a popular vote in its favor. No one doubts the general power of the legislature to make such regulations and conditions as it pleases with regard to the taking effect or operation of laws. They may be absolute, or conditional and contingent; and, if the latter, they may take effect on the happening of any event which is future and uncertain. Instances of this kind of legislation are not infrequent. The law of congress suspending the writ of habeas corpus during the late rebellion is one, and several others are referred to in the case *In re Richard Oliver*, 17 Wis, 681. It being conceded that the legislature possesses this gen-

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eral power, the only question here would seem to be whether a vote of the people in favor of a law is to be excluded from the number of those future contingent events upon which it may be provided that it shall take effect. A similar question was before this court in a late case (*State, ex rel. Attorney General, v. O'Neill, Mayor, etc.*, 24 Wis., 149), and was very elaborately discussed. We came unanimously to the conclusion in that case that a provision for a vote of the electors of the city of Milwaukee in favor of an act of the legislature, before it should take effect, was a lawful contingency, and that the act was valid. That was a law affecting the people of Milwaukee particularly, while this was one affecting the people of the whole State. There the law was submitted to the voters of that city, and here it was submitted to those of the State at large. What was the difference between the two cases? It is manifest, on principle, that there cannot be any."

It is perceived that the illustration given by Redfield, C. J., fall directly within the description of the admissible contingencies, referred to by Ruggles, C. J., and Reed, J., which may be selected in advance by the legislature as determining the expediency of putting into operation the provisions of a given law, without recourse to the decision of the people of the state or country who are to be affected by that law, and whereby a vote may make the law operative or not, according to their own views of policy or expediency, without regard to the grounds on which the legislators acted in passing or pro-

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posing the law; in the former class of cases the act becoming a law, and becoming operative by virtue of the authority of the legislature itself, and in the latter being reduced to a mere proposition to the electorate of a state, and becoming operative as a law by virtue only of the action of such electorate. It is also perceived that Dixon, C. J., offers the same class of illustrations and one other; the last being the case of a town or city voting to accept or reject a law provided by the legislature for a specified locality in a state, a municipal corporation of the state, a point to which we shall return later.

We incline to the views expressed by Ruggles, C. J., and Reed, J.

Judge Cooley, in his work on Constitutional Limitations, while expressing his personal opinion that the rule championed by Redfield, C. J., and Dixon, C. J., is the sounder one, yet concedes in his text that the opposite view has the weight of judicial opinion in its favor, so far as concerns general laws applicable to a whole State. Id. (7th Ed.), pp. 168, 169. See to the same effect the discussion contained in the *Opinion of the Judges, in re Municipal Suffrage to Women*, 160 Mass., 586, 36 N. E., 488, 23 L. R. A., 113; and *State, ex rel., v. Forkner*, 94 Iowa, 1, 62 N. W., 772, 28 L. R. A., 206; *Ex parte Wall*, 48 Cal., 279, 17 Am. Rep., 425; *Morford v. Unger*, 8 Iowa, 82; *Santo v. State*, 2 Iowa, 165, 63 Am. Dec., 487; *State v. Beneke*, 9 Iowa, 203; *State v. Wilcox*, 45 Mo., 458; *Gibson v. Mason*, 5 Nev., 283; *State v. Hayes*, 61 N. H., 264; *Thorne v. Cramer*, 15 Barb. (N. Y.), 112; *Bar-*

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to v. *Himrod*, supra; *People v. Stout*, 23 Barb. (N. Y.), 349; *Parker v. Com.*, 6 Pa., 507, 47 Am. Dec., 480; *Cin., etc., Ry. Co. v. Clinton*, 1 Ohio St., 77; *People v. Collins*, 3 Mich., 343.

But the great majority of the cases seem to favor the constitutionality of what are termed "local option laws," under which the people of a county, city, or town are permitted to decide by a popular vote whether a given statute, providing police regulations, in respect of the sale of intoxicating liquors, the running of live stock at large, etc., shall be operative in such county, city, or town. Cooley, *Const. Lim.* (7th Ed.), 172-174; 19 Am. & Eng. *Ency. Law* (2d Ed.), pp. 488-496.

We have read and considered such of the cases cited as are accessible to us, and in the discussions contained in the majority and minority opinions appearing in these cases we have had the benefit of many other authorities not directly accessible, and we have attentively considered the grounds on which the numerical weight of authority is rested. It would be a useless consumption of time to attempt a discussion of these cases—indeed, an impossible task within the limits of a judicial opinion.

Suffice it to say that questions of State constitutional law are, in a very important sense, peculiarly local; and in every jurisdiction the court of last resort must decide for itself the meaning of the constitution under which it exists, and the validity of laws enacted by the legislative branch of the government. The decisions of other

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courts, construing constitutions containing similar provisions, can be, at most, only suggestive and advisory.

Upon the subject of a popular vote to determine whether a legislative act shall be effective within a given subdivision of the State, our constitution contains the following provisions:

By article 2, section 29, it is provided that: "The general assembly shall have power to authorize the several counties and incorporated towns in this State, to impose taxes for county and corporation purposes respectively, in such manner as shall be prescribed by law . . . But the credit of no county, city, or town, shall be given, or loaned to or in aid of any person, company, association, or corporation, except upon an election to be first held by the qualified voters of such county, city, or town, and the assent of three-fourths of the votes cast at said election. Nor shall any county, city, or town, become a stockholder with others, in any company, association, or corporation, except upon a like election, and the assent of a like majority."

By article 10, section 2, it is provided: "No part of a county shall be taken off to form a new county or a part thereof without the consent of two-thirds of the qualified voters in such part taken off; and where an old county is reduced for the purpose of forming a new one, the seat of justice in said old county shall not be removed without the concurrence of two-thirds of both branches of the legislature, nor shall the seat of justice

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of any county be removed without the concurrence of two-thirds of the qualified voters of the county."

By article 2, section 1, it was provided that: "The powers of the government shall be divided into three distinct departments: the legislative, executive, and judicial."

By section 2 it was provided that : "No person or persons belonging to one of these departments shall exercise any of the powers properly belonging to either of the others, except in the cases herein directed and permitted."

The only power of legislation which was reserved to the people at large was the power to vote upon amendments to the constitution. Article 11, section 3. For the rest, they were content to reserve to themselves the power of electing their officers for limited terms, and to reserve the various fundamental rights embraced in the bill of rights, only one of which latter, that embraced in section 23, bears upon legislation. That section declares "that the citizens have a right in a peaceable manner, to assemble together for the common good, to instruct their representatives, and to apply to those invested with the powers of government for redress of grievances, or other purposes, by address or remonstrance."

It is a well-recognized principle that the legislature of the State has all powers of legislation, except in so far as it may be restrained by the constitution of the State, or of the United States, expressly or by necessary impli

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cation. *Redistricting Cases*, 111 Tenn., 234, 291, 292, 80 S. W., 750.

There is another principle which should be recalled at this stage of the discussion, viz.: That legislative power cannot be delegated except in those special instances in which the constitution itself authorizes such delegation, or those sanctioned by immemorial usage originating anterior to the constitution and continuing unquestioned thereunder. The immemorial usage referred to has found its expression in only two forms: Firstly, in the powers conferred upon municipal corporations in their several charters, and by general statutes applying to such corporations and pertaining to the ordering and administration of their local affairs; secondly, in the powers conferred upon the quarterly county courts of the several counties of the State for the management of local matters. It is said in our cases that the counties of the State are municipal corporations of a noncomplex character, that the county courts constitute the governing body of these corporations, that these courts have judicial and police powers, that "they can exercise that portion of the sovereignty of the State communicated to them by the legislature, and no more," and that "in the exercise of the powers so conferred they become miniature legislatures, and the powers so exercised by them, whether they are called municipal or police, are in fact legislative powers." *Grant v. Lindsay*, 11 Heisk., 666; *Maury Co. v. Lewis Co.*, 1 Swan, 236, 240; *Redistricting Cases*, 111 Tenn., 253-257, 80 S. W., 750. The origin of

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the power to delegate legislative functions to the counties is not only to be found in ancient usage, but also may be traced to the direct language of the constitution, which provides, in article 11, section 9, that "the legislature shall have the right to vest such powers in the courts of justice, with regard to private and local affairs, as may be expedient."

But in delegating the powers mentioned to municipal corporations proper, or to counties, the legislature has always, under our system, dealt with the governing bodies of these organizations as the representatives of the constituent people, and not directly with the people themselves. Nor is the principle impaired by the force of the well-recognized rule that the acceptance, rejection, or surrender of municipal charters may be left by legislative act to the vote of the people, embraced in an existent or proposed municipality (Cooley Const. Lim. [7th Ed.], 165, 166; *Brinkley v. State*, 108 Tenn., 475, 67 S. W., 796), any more than by the fact that general charters may be framed for the creation of private corporations which may never become actually operative until adopted by the requisite number of persons organizing under them, and which may subsequently be surrendered by the same persons or their successors.

We see no difference in principle between making the operative efficacy of an act of the legislature dependent upon the contingency of a favorable vote of the whole constituency of the State (which we have seen cannot be done) and making the efficacy of an act dependent upon

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the favorable vote of a single county, and there is none. Such difference cannot be found in the fact, as many cases in other jurisdictions hold, that the powers conferred upon such subordinate divisions of the State are police powers. The nature of the powers conferred may have, and no doubt does have, a controlling influence in determining whether they shall be delegated at all, but can have no influence in fixing the method under which they shall be devolved. Whether a legislative act embrace police powers or other powers, rights, or duties, at last it is but a legislative act, and to be valid must square with the constitution in all respects. All legislative acts, regardless of their contents or of their relative importance, must pass the same ordeal; not one, from a constitutional standpoint, being entitled to more consideration, or subjected to more stringent limitations, or to be treated with more leniency than any other. All must be measured with the same measure.

On these grounds we are of the opinion that, under our constitution, no legislative act can be so framed as that it must derive its efficacy from a popular vote. To be valid it must leave the hands of the legislature complete; not in the sense that it must go into effect at once, it is true, but it must at its birth bear the impress of sovereignty, and speak the sovereign will. If it contain within itself a condition or a contingency suspending to some future time, or to the happening of some future event, its obligatory force as a rule of action or conduct of the people for whom it was intended, that contingency

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or that event must be one selected by the sovereign power itself as one, the happening of which shall render it immediately expedient that the suspension of the power inherent in the act shall cease, and that it shall at once become operative as a rule of conduct for the government of the people. Obviously, if the contingency selected be the favorable vote of the people who are to be governed by the law, it is that vote which makes the statute efficacious as a law, and not the antecedent will of the legislature, the constitutional law-making power. It is said in some of the cases that the vote is the effect of the law, and not the law the effect of the vote; but we think this is a mere play on words, since it is clear that, if all laws were made dependent upon such a contingency, representative constitutional government would be destroyed.

It is the purpose of our institutions, so far as they concern legislative bodies, that the popular will should find expression in the laws enacted by such bodies. This is to be accomplished, however, under the constitution, by sending representatives to those bodies whose views upon public questions are known, and whose faithfulness is approved, and by petition, and by instructions formulated in popular assemblies and forwarded to the law-making power, and by retiring from public life those who fail to truly represent their constituents, and by sending in their stead others who will supply what has been left undone, and correct what has been wrongfully done.

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For the reasons stated, we are of the opinion that the amendatory act of 1905 above reproduced is unconstitutional and void, and that the judgment of the court below in favor of the defendant must be affirmed.

PACIFIC MUTUAL LIFE INSURANCE CO. v. GALBRAITH.*

(Knoxville. September Term, 1905.)

1. **LIFE INSURANCE POLICY.** Forfeiture of, for nonpayment of premium.

Where a life insurance policy provides that it shall lapse and be void if the premiums thereon are not paid when due, it is well settled that such policy will be forfeited, if the premiums are not paid as stipulated. (*Post*, pp. 477, 478.)

Cases cited and approved: *Ressler v. Life Ins. Co.*, 110 Tenn., 411; *Thompson v. Life Ins. Co.*, 104 U. S., 252; *Lantz v. Ins. Co.*, 139 Pa., 546.

2. **SAME.** Reinstatement of, after forfeiture, operates as a new contract.

Where there is a forfeiture of a life insurance policy on account of the failure to pay premiums as therein stipulated, a reinstatement thereof operates as a new contract, as if the policy was then for the first time issued. (*Post*, pp. 478-483.)

Cases cited: *Bottomley v. Ins. Co.*, 170 Mass., 274; *Ash v. Fidelity Mutual, etc. Asso.*, 63 S. W., 944; *Teeter v. United Life Asso.*, 159 N. Y., 411.

Case distinguished: *Mass. Benefit Life, etc., v. Robinson*, 104 Ga., 256.

Case disapproved: *Goodwin v. Providence Savings Assn.*, 97 Ia., 226.

3. **SAME. Same. Same. Case in judgment.**

The policy sued on provided that it should be void for failure of the insured to pay any premium when due and also provided

*As to incontestability of life insurance under provisions of the policy or a statute, see note to *Clements v. New York Life Ins. Co.* (Tenn.), 42 L. R. A., 247.

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that it should be incontestable after two years from the date of issue. The insured failed to pay a premium when due, but he was subsequently reinstated upon fraudulent representations made by him. *Held*: The reinstatement operated as a new contract and the insurer was entitled to take advantage of such fraudulent representations at any time within two years thereafter.

4. SAME. Construction of.

A life insurance policy is to be liberally construed in favor of the assured and, if it is susceptible of two interpretations, that which will sustain the claim and cover the loss should be adopted. (*Post*, pp. 482, 483.)

Cases cited and approved: *Thompson v. Phoenix, etc., Co.*, 136 U. S., 287; *National Bank v. Ins. Co.*, 95 U. S., 673.

FROM HAWKINS.

Appeal in error from the Circuit Court of Hawkins County.—A. J. TYLER, Judge.

J. O. PHILLIPS, for Insurance Co.

S. F. POWELL and SUSONG & BIDDLE, for Galbraith.

MR. CHIEF JUSTICE BEARD delivered the opinion of the Court.

This suit was brought by defendant in error, as assignee, to recover on an insurance policy issued by plain-

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tiff in error on the life of one Harry M. Johnson for the sum of \$2,000. The policy bears date the 1st of January, 1902, and the assured died on the 14th of February, 1904.

The declaration, after setting out the issuance of the policy and the death of the assured, alleges that at the time of the death the policy was in full force and effect. To this declaration the insurance company filed three pleas. The first of these raised the general issue. The second averred that the policy was issued pursuant to a written application made by Johnson to the company, which application, by the terms of the policy, was made a part thereof, wherein he made certain representations and guaranties with regard to his occupation, habits, and health, all of which were material to the risk, and were at the same time false and fraudulent in fact.

The third plea averred that it was a part of the contract that the annual premium provided for in the policy should be paid on the 1st day of January in each year, and on failure to make prompt payment of any such premium the policy should lapse; that on January 1, 1903, this being the day on which the second annual premium was due, Johnson failed to pay the same as stipulated, and thereby the policy became lapsed and of no effect; that on January 10, 1903, Johnson, in order to procure reinstatement and revival of the policy, furnished to the plaintiff in error a certificate containing a warranty of present good health; that relying upon the truthfulness of this certificate, and without any knowl-

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edge of its falsity, the plaintiff in error accepted the premium then overdue and reinstated the policy. It is then averred that the warranty contained in this certificate was false, in this: "That the said Johnson was not at its date . . . in all respects in good, sound, and unimpaired condition," but, on the contrary, he was then greatly impaired in health, suffering with the disease known as "tuberculosis" or "consumption," complicated with Bright's disease, from which he died on February 14, 1904. Wherefore it was averred that, the reinstatement having been procured by this false and fraudulent statement, the plaintiff in error was not bound on the policy.

To the third plea the defendant in error filed a replication, in which it was said that it was not true that Johnson made false representations and warranties in the certificate furnished by him for the reinstatement of the policy. Again, and for additional replication, it was averred that it was expressly stipulated in the policy sued on that it should be indisputable, for any reason, after two years from its date of issuance, and that the policy was issued January 1, 1902, and two years had elapsed at the date of the death of the assured, and, this being so, the defendant in error relied upon and pleaded as a bar to the contest attempted by the plaintiff in error.

A demurrer was interposed to the second plea, the grounds of which it is unnecessary to state.

To the third replication set out above, the plaintiff in

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error filed a demurrer, in which it was insisted that the "two years incontestable clause referred to therein had no application to the certificate of good health made by Johnson for the purpose of procuring a reinstatement of the policy then lapsed. . . . because it appears from the declaration and defendant's plea, to which the third replication is responsive, that the certificate of good health in question was made on January 10, 1903, and that the assured died on February 14, 1904; wherefore, it appears that the period of two years from the date of making the certificate and reinstatement of the policy had not expired at the time of the death of the assured, and defendant is not, therefore, debarred from showing fraud in the making of the certificate and contesting the policy because thereof."

The demurrer to the defendant's second plea, and also the demurrer to the plaintiff's third replication, were overruled, and thereupon, by way of replication to the second plea, the plaintiff averred in substance the same as had been replied by him to the third plea; that is, again he interposed as a bar to the contest bound to be made with regard to the alleged fraudulent statement of the assured, upon which the policy was reinstated, the two years incontestable stipulation of the policy, insisting that this period ran from the date of the policy, and not from the date of the reinstatement.

The plaintiff in error then confessing it could no further go by way of rejoinder to the second replication to the second plea, or to third replication to the third plea,

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these replications were therefore taken for confessed, and the circuit judge, sitting without the aid of the jury, then proceeded to hear the cause, and upon the pleading and the evidence adduced adjudged that the defendant in error, as assignee, was entitled to recover the full face of the policy, with interest from the death of the assured, and the cost of the cause.

The case being now before us for review, it is insisted by the defendant in error that the judgment should be sustained, first, because there was in fact, as appears upon the face of the record, no lapse at the time this certificate was made by the assured on the 10th of January, 1903, or at the time he paid his annual premium on that day, and, this being so, the certificate was of no force or effect on the relations of the parties growing out of the issuance of the policy; and, second, that, conceding a lapse, the trial judge was right in his ruling that the incontestable clause was operative from the date of the policy, rather than from that of the reinstatement.

The first of these contentions is rested on the ground that, while the policy bears date 1st of January, 1902, yet it is assumed to be apparent from the record that the policy in fact was not issued until the 15th of that month and that year, and counting from this later date there was no lapse at the time the certificate was issued on which the reinstatement was based. In the face of the pleading of the defendant in error this contention cannot be maintained. In the replication to the second and third pleas, it is distinctly stated "that said policy

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was issued on the 1st of January, 1903." This contention, therefore, may be dismissed without discussion of the cases cited in its support.

This leaves open for determination the real question, presented in the record, as to the soundness of the holding of the trial judge that by the stipulation in question the policy was incontestable from its date, and as the assured died more than two years from that time the company was liable, notwithstanding a lapse and the reinstatement through the false warranty of the assured within that period.

The policy was issued in consideration of an advance payment of an annual premium which might, at the option of the assured, be made in semiannual or quarterly installments, with the conditions found in the application for the policy, which by the terms of the letter was made a part thereof, that "the policy shall lapse and be void if any premium or installment thereon is not paid, as therein provided, and then all previous payments shall be forfeited to the company."

The incontestable clause, upon which turns the present controversy, is as follows: "This policy shall be indisputable after two years of its date of issue for the amount due provided the premiums are duly paid."

It is well settled that a policy is forfeited by its terms if the premium (or any note given for it) is not paid at maturity. *Thompson v. Life Ins. Co.*, 104 U. S., 252, 26 L. Ed., 765; *Ressler v. Life Insurance Company*, 110 Tenn., 411, 75 S. W., 735.

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The effect of nonpayment of the premium is made clear by the policy itself. As is said in *Lantz v. Insurance Co.*, 139 Pa., 546, 21 Atl., 81, 10 L. R. A., 577, 23 Am. St. Rep., 202: "It declares that, if not paid on the days named and in the lifetime of the insured, the policy shall cease and determine. . . . It ceases to bind the company and to protect the assured, and this without any act or declaration on the part of the former. It does not require a formal forfeiture. . . . As to him (the assured) it is a dead policy. It is true that it may be restored to life by the subsequent payment of the premium and its acceptance by the company. This, however, is a new contract, by which the company agrees in consideration of the premium to continue in force a policy which had previously expired; in other words, it is a new assurance, though under the former policy."

This it seems to us, is a clear statement of the want of relationship of the parties during the lapse of a policy like the one in question, and of the character of the new relations which grow out of its reinstatement. While in a state of absolute collapse, the former owner of the policy has neither a legal nor an equitable claim on the company. By his failure to comply with the condition upon which it could be kept alive he has *ipso facto* forfeited all rights under the policy. As to him, it is as if it had never been written. If any benefit is to accrue to him therefrom, it must be revitalized, and this can only be done with the consent of the company. When it is done, then it becomes a new assurance—a new contract

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—as if the policy then was for the first time issued. If this be its nature, then it must operate in the future from the date of its reinstatement, and whatever might be its original date, or howsoever long it may have run, yet it would seem, by the force of necessary logic, to follow that the incontestable clause would begin its new life with the date of the new contract. And it would seem also to be as certainly true that if the assured obtained the reinstatement by fraud, or by false warranties material to the risk, during the period reserved for contest, the company should be allowed to protect itself against such unfair dealing.

In *Bottomley v. Insurance Company*, 170 Mass., 274, 49 N. E., 438, it is said that a revived policy of life insurance does not go into effect if a declaration or warranty contained in the application therefore is untrue. This statement, however, must be taken with the modification that if the policy contains a time limit, beyond which it is incontestable, when that limit is passed, then, unless fraud is within the class excepted from the operation of the clause fixing the limit, it is no longer a defense, but the policy is then affected notwithstanding the fraud.

On the exact question now being considered few authorities have been found. However, in *Teeter v. United Life Association*, 159 N. Y., 411, 54 N. E., 72, a policy containing, in favor of the assured, a two-year limitation clause lapsed, and was reinstated upon a health certificate. The death of the assured occurred more than four

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years after that date. The company resisted recovery upon the ground that the statement contained in the certificate was false. To this the court said: "It seems to us after an examination of the contract that the defendant had two years after the reinstatement within which to investigate the conditions of Teeter's health at the time of the making of the reinstatement certificate, and that after that date the policy became indisputable." It was further said: "Turning to the facts of the case, we find that Teeter . . . duly made out the reinstatement certificate . . . and the defendant upon its receipt reinstated him. Thereupon the policy here was restored in full vigor as of that date, and by its very terms it was to become incontestable after two years."

In *Ash v. Fidelity Mutual, etc., Association*, 63 S. W., 944, decided by the court of civil appeals of Texas, the question here presented was considered and determined. The court said: "The clause of the policy providing that it should be incontestable especially excepts from its provision the agreement as to the payment of premiums and nonpayment of any premium would, under the terms of the policy, forfeit it. After the forfeiture . . . it would be again subject to forfeiture on account of false statements made by the insured to obtain a reinstatement. In the renewal contract deceased not only made new statements, but also reiterated the statement in the original application, and agreed that the falsity of either . . . should render the policy null and void." It is insisted, however, by the defendant in

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error that a contrary holding is found in *Mass. Benefit Life, etc., v. Robinson*, 104 Ga., 256, 30 S. E., 918, 42 L. R. A., 261. We have carefully examined the opinion in that case, and, while it is true that there are one or two paragraphs in it which seem to bear out that view, yet, taken as a whole, we do not think that the case supports the contention of the defendants in error. In the course of the opinion it is said that "if there was a lapse of the policy . . . growing out of the failure to pay the premiums . . . and a reinstatement was necessary . . . and such reinstatement was secured by a certificate furnished by the assured in which there was a statement that he was in good health, and such statement was false and so material that his conduct would amount to a fraud, then the effect of the fraud would be to render his reinstatement void, and the policy would remain lapsed."

It is true in the further course of the opinion the court says that, while it has been held that a reinstatement makes a new contract, the old contract is looked to for the terms, conditions, and stipulations of the new. The court then adds: "The old contract in the present case being that the policy should be incontestable after two years from its date upon the payment of three annual premiums, the new contract would be governed by the same terms, and the period of incontestability would be reached three years from the date of the original policy, notwithstanding . . . a lapse and reinstatement had taken place."

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This last statement was not necessary to the determination of the case, and, with proper deference to the learned court delivering the opinion, we think it hardly reconcilable with what had gone before. But whether or not a dictum, it seems to us the concession made in the paragraph to the effect that, upon the reinstatement, a new contract is made, repels the conclusion that the period of incontestability begins with the date of the old contract, that is, the original policy. For if, as conceded it was a new contract, while the old policy would be looked to for terms and stipulations, yet, we submit, these could only be operative from the day of the making of the new contract.

In *Goodwin v. Provident Saving Association*, 97 Iowa, 226, 66 N. W., 157, 32 L. R. A., 473, 59 Am. St. Rep., 411, it is said that reinstatement of a policy of insurance is not the making of a new contract, but simply the cancellation of a forfeiture, whereby the original contract is restored. For this the court cites *Lindsey v. Western, etc., Aid Society*, 84 Iowa, 734, 50 N. W., 29; and *French v. Mutual, etc., Ass'n*, 111 N. C., 391, 16 S. E., 427, 32 Am. St. Rep., 803. We have not had the opportunity of seeing the first of these cases, but an examination of the last discloses it is not authority for the proposition. In addition, we think the weight of judicial opinion is against the holding of the Iowa court as to the effect of reinstatement. For this reason, as well as because we regard the proposition as unsound, we would not be disposed to follow it.

We concede the full force of the contention that a

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policy of insurance is to be liberally construed in favor of the insured. This rule is applied in many of our cases involving life, accident, and fire risks. And it is further conceded that, when words are used which may without violence be given two interpretations, that which will sustain the claim and cover the loss should be adopted. *Thompson v. Phoenix, etc., Co.*, 136 U. S., 287, 10 Sup. Ct., 1019, 34 L. Ed., 408; *National Bank v. Insurance Co.*, 95 U. S., 673, 24 L. Ed., 563.

But we see no rule for the application of this rule when it is once assumed, as we think must be done, that there is a new contract dating with the reinstatement. This being so, we think, beyond cavil, there can be no two interpretations of the incontestable clause in this policy.

It follows that the circuit judge was in error in ruling on this point. Falling into this error, he improperly excluded from consideration evidence tending to show the falsity of the statements of the assured in the health certificate furnished by him for a reinstatement, and the testimony of the witness Harris, general agent of the company, that the premium due on the policy on the 1st of January, 1903, was not paid at maturity, and thereafter the company refused to accept payment of the same until the health certificate was furnished, and that the acceptance of this premium was on the company's faith in the truth of the warranty contained therein, and without knowledge of its falsity.

The judgment of the court below is therefore reversed, and the cause remanded for a new trial.

Ricardi v. Gaboury.

RICARDI et al. v. GABOUEY et al.

(*Knockville*. September Term, 1905.)

1. SALE OF INFANT'S PROPERTY. Jurisdiction of chancery court over.

Jurisdiction is conferred by statute upon the chancery court to make sales of the property of persons under the disability of coverture and infancy; but the chancery court has inherent jurisdiction, independent of the statute, to sell the real estate of an infant, where it is manifestly for his interest that a sale be made.

Code cited: sec. 5072 (S.); sec. 4054 (M. & V.); sec. 3323 (1858).

Cases cited and approved: *Brown's Case*, 8 Humph., 200; *Martin v. Keeton*, 10 Humph., 536; *Thompson v. Mebane*, 4 Heisk., 370; *Simpson v. Alexander*, 6 Cold., 619; *Porter v. Porter*, 1 Baxt., 299; *Hurt v. Long*, 90 Tenn., 445; *Ridley v. Halliday*, 106 Tenn., 619; *Lenow v. Arrington*, 111 Tenn., 720.

Case cited and overruled: *Rogers v. Clark*, 5 Sneed, 665.

2. LEASE OF INFANT'S PROPERTY. Same.

The chancery court also has inherent jurisdiction to decree the execution of a lease of the real estate of infants, for a term extending beyond their minority, where such lease is manifestly for their interest.

Cases cited and approved: *Talbot v. Provine*, 7 Baxt., 502; *Marsh v. Reed*, 184 Ill., 263; *Hedges v. Riker*, 5 Johns. Ch., 163; *Mills v. Dennis*, 3 Johns. Ch., 370; *Cecil v. Earl of Salisbury*, 2 Vern., 224.

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FROM KNOX.

Appeal from Chancery Court, Knox County.—JOSEPH W. SNEED, Chancellor.

JOHN W. GREEN, for Ricardi *et al.*

R. A. BROWN, guardian *ad litem*, for Gaboury *et al.*

MR. CHIEF JUSTICE BEARD delivered the opinion of the Court.

The complainant Mary J. Ricardi is the owner of an undivided one-half, and her co-complainant Nellie R. Gaboury of an undivided one-eighth, interest, while the defendants, who are minors and grandchildren, as well as wards, of Mary J. Ricardi, are the owners of the remaining three-eighths interest, in a certain lot fronting twenty-five feet on the west side of Gay street, and running back between parallel lines 102 feet to an alley, situate in the city of Knoxville. On this lot there stands a business house now occupied under a five-year lease. The annual rental of this property is \$1,350, from which after deducting the amounts expended for repairs, insurance, and taxes, a net sum of about \$900 remains, which is divided between the parties in the proportions indicated above. The complainant G. H. Miller controls or owns a lot adjoining the one in question, and has re-

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cently made a proposition to his co-complainants to take a lease on the latter for the term of ninety-nine years. In consideration of such a lease, Miller agrees to pay an annual rental of \$1,500 from the date of the ratification by the court of the lease, and in addition, at his own expense, to take care of all taxes, insurance, and repairs upon the property. He further agrees that the lease so entered upon shall provide that at the end of every twenty years, beginning with such ratification, the net annual rental of the property shall be adjusted by arbitrators, one of whom is to be selected by the owners of the property and the other by the lessee, and upon their failure to agree that the two arbitrators may select a third, who shall fix the annual rental to be paid by the lessee during the next succeeding term of twenty years, but in no event shall the net rental during the existence of the lease ever be less than \$1,500 per annum. He also agrees that the rent secured shall be paid in equal monthly installments, and that the failure to pay these installments, or any one of them, when due, or to pay taxes as they accrue, and keep up insurance on the property, and make repairs, shall work, at the option of the owners of the property, a forfeiture of the lease. It is further agreed by him that the lease to be executed shall contain these and other additional stipulations, to wit: That the lessee shall comply at all times with all city laws and ordinances, and that the premises shall not at any time be used in such a manner as to create a nuisance or to violate any law, either State or municipal; that the lessee

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shall take good care of the property, and return the same in good condition at the expiration of the lease, and that all buildings or other improvements on the premises at that time shall become the property of the owners of the ground; that the improvements now standing on this lot are worth \$10,000, and that the improvements which are to be left upon it at the termination of the lease shall not be of less value.

The purpose of the complainant Miller in obtaining this lease, as disclosed by the record, is to erect upon this and the adjoining property a large and handsome building, of improved architecture, to meet the business needs of a growing city. The complainants Ricardi and Gaboury, believing the contemplated lease to be an advantageous one for all parties interested, filed the present bill asking that the chancery court pass a decree authorizing it to be made so far as the minors are concerned. Their co-complainant, Miller, joins in the bill to indicate his good faith in the matter, and to submit himself, as well as the proposed contract, to the jurisdiction of the court.

As has been stated, the complainant Mrs. Ricardi is not only the guardian, but the grandmother, of the minor defendants, and she alleges in the bill that in agreeing to make this lease she has consulted alone the interest of these grandchildren; that she is an old woman, and intends that her one-half interest in the property shall pass to these defendants under her will, so that they, during the remainder of her life, will be in part of the

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beneficiaries of this new lease, and at her death will be the owners of a seven-eighths interest in the property. The clerk and master of the chancery court of Knoxville, to whom the case was referred, in order, among other things, that he might take proof and report as to the advisability of this lease so far as the interest of the minors was concerned, in his response to the order used the following language:

"It is clearly established that it is to the interest and advantage of the minors that said lease be made, ratified, and approved by the court. The proposed arrangement is particularly a desirable one, in view of the fact that four of the owners are females and that they will thereby get a safe, certain, and absolutely secure investment of their means, bringing a stated income upon which they can rely, not subject to fluctuations or depression in prices which hard times may bring about, and which cannot well be taken away from them by improvident marriages in case they marry spendthrift husbands."

The chancellor confirmed this report, and authorized the execution of the lease embracing these terms. From this decree the minor defendants, through their guardian *ad litem*, appealed to this court. The case was then referred to the court of chancery appeals for adjudication, and, that court having reversed the chancellor's decree, it is once more before us upon an appeal prosecuted by the complainants from this decree of reversal.

We think it clear that it is manifestly to the advan-

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tage of the minor defendants that the proposed lease should be made. Without the expenditure of a dollar from their estate, improvements will be made which will at once increase the net rental from about \$900 to a fixed net annual rental of \$1,500. The objection suggested by the court of chancery appeals, that the record shows that property in the city of Knoxville is increasing in value, because of a rapidly growing population and greater business needs, which will naturally enhance rental income from this property, we think satisfactorily met by the fact that upon this record this increase of rental income could only be secured by an improvement of the property made either by the parties themselves, or by a lessee taking it upon terms like those now offered by the complainant Miller. The further objection which is rested upon the length of the lease proposed, is also obviated by the provision that the rent may be readjusted at the end of each period of twenty years, and that at no time shall the net income fall below \$1,500 per annum.

As to the power of the court of chancery to authorize this lease we entertain no doubt. Section 5072 of Shannon's Code provides that for and on behalf of persons laboring under the disability of coverture and infancy a court of chancery may consent to and decree a sale of the property, real or personal, of such persons. While we have this Code provision, yet it is well settled in this State that the chancery court has of itself jurisdiction to sell the real estate of a minor, where it is manifestly

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for his interest that a sale be made. This jurisdiction is independent of the statute and inheres in the texture and character of the court. *Brown's Case*, 3 Humph., 200; *Martin v. Keeton*, 10 Humph., 536; *Thompson v. Mebane*, 4 Heisk., 370, *Simpson v. Alexander*, 6 Cold., 619; *Porter v. Porter*, 1 Baxt., 299; *Hurt v. Long*, 90 Tenn., 445, 16 S. W., 968; *Ridley v. Halliday*, 106 Tenn., 619, 61 S. W., 1025, 53 L. R. A., 477, 82 Am. St. Rep., 902; *Lenow v. Arrington*, 111 Tenn., 720, 69 S. W., 314. It is true that in *Rogers v. Clark*, 5 Sneed, 665, a contrary view was expressed. But that case is out of harmony with cases which preceded, as well as those which have succeeded it, and while so far as we have discovered, it has not been expressly overruled, yet, in view of the repeated announcements of the rule stated above, it cannot now be regarded as authority on this question.

The theory upon which the court exercises its jurisdiction in all such cases is that the infant's real estate shall be so controlled by its decrees as to secure his best interest. In *Lenow v. Arrington*, supra, this court affirmed a decree of the chancellor authorizing a sale of unimproved property in which minors had an interest, and at the same time approved the acts of a testamentary trustee, who, without express authority given in the will, had made mortgages upon real estate in which these minors were interested, the proceeds of which were used in its improvement with the view of enlarging the rental income. We think it equally within the power of the chancery court to authorize the making of a lease of

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the property of a minor as will be most beneficial to him. In *Talbot v. Provine*, 7 Baxt., 502, the court said:

"We are of opinion that, during the minority of infants, the chancery court has jurisdiction to authorize or confirm leasehold contracts for the protection and preservation and for the enhancement of the real estate of such infants, when it is made manifestly to appear that contracts for either of these purposes is for the interest of the minors. Whether such contracts could be authorized or confirmed producing incumbrances on the estate of minors after their maturity we are not now called upon to decide."

The question thus reserved, because not necessary for determination in that case, has been answered by other courts of very high authority. In *Hedges v. Riker*, 5 Johns. Ch., 163, there was a devise to executors, in trust for C. for life, and, if she died without issue, then in remainder over, with power to the executors "to sell and dispose of so much of the real estate as should be necessary to fulfill the will," and it was held by Chancellor Kent that this power was sufficient (the persons in remainder being infants) to authorize the executors to execute leases for years of the real estate for such terms and upon such conditions as were reasonable and necessary to carry into effect the intention of the testator expressed in the will. Not content, however, to rest the case alone upon an implication from the power given in the will, it was held that the court, having jurisdiction over the property of infants, could authorize the execu-

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tors to make such leases, with consent of the tenant for life, for the term of twenty-one years, or building leases, as they should deem most beneficial to the interest of the tenant for life and those entitled to the reversion or remainder in fee. In the course of the chancellor's opinion it is said: "A lease for years is still a disposition of the estate within the terms of the power, and without resorting to the power, the general jurisdiction of the court over the property of infants is adequate to confer the authority. The court stands, as Lord Nottingham observed, *in loco parentis*, and it is understood to be clearly settled (*Mills v. Dennis*, 3 Johns. Ch., 370) that the court may change the estate of infants from real into personal, and from personal into real, whenever it deems such a proceeding most beneficial to the infant. It was declared by the lords commissioners in *Cecil v. Earl of Salisbury*, 2 Vern., 224, that the court had often decreed building leases for sixty years of infant's estates, when for their benefit." In *Marsh v. Reed*, 184 Ill., 263, 56 N. E., 306, it was held that a court of equity had jurisdiction of a bill to authorize a trustee under a will to execute a lease or real estate for a period of ninety-nine years, when it appeared that all the adult beneficiaries were desirous that the lease be made, and it was to the manifest advantage of all parties, both adult and minors, that this be done, although the testator had by a clause in his will limited the power of the testamentary trustee in the making of the lease to a much shorter term.

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Without the support of authority, it would seem that, granting the jurisdiction of an equity court to dispose of fee in a minor's real estate when it clearly appeared this was manifestly in his interest, the disposition of a lesser estate upon the same ground might equally be sanctioned by the court. It is to be observed that the making of a lease such as the one desired by the complainants in this cause does not deprive the parties of any interest in the property to be leased. Its effect is simply to prevent the lessors from entering upon the property and taking actual possession thereof as long as the terms of the lease are observed by the lessee. The title to the property, and the right of alienation subject to the lease, remain as if no lease had been executed.

The decree of the court of chancery appeals is therefore reversed, and the cause is remanded to the chancery court of Knox county, in order that that court may supervise and direct the execution of a lease by and with the complainant G. H. Miller of this property.

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FARRELL v. W. B. LOCKETT & Co.*(Knoxville. September Term, 1905.)*

1. **VOLUNTARY BANKRUPTCY.** Liens obtained by legal proceedings within four months before, void.

Sec. 67 of the federal bankruptcy act of 1898, providing that all levies, judgments, attachments, or other liens obtained through legal proceedings against an insolvent, within four months prior to the filing of a petition in bankruptcy against him, shall be null and void in case he is adjudged a bankrupt, applies to voluntary as well as involuntary petitions in bankruptcy.

Act of congress cited and construed: July 1, 1898, ch. 541, sec. 67f; (30 Stat., 565) (U. S. Comp. St., 1901, p. 3450).

Case cited and approved: *In re Darwin*, 117 Fed., 407, 54 C. C. A., 581.

2. **SAME.** Same. Trustee entitled to proceeds of attached property if still in hands of officer making sale.

The trustee of a bankrupt is entitled to the proceeds of a sale of property of the bankrupt, had under attachment proceedings brought by a creditor of the bankrupt within four months next before the petition in bankruptcy is filed, less reasonable and necessary attorney's fees expended in its collection, if the proceeds of such sale are still in the hands of the sheriff, receiver, or other officer making the sale, at the time the petition is filed.

Cases cited and approved: *In re Kennedy*, 95 Fed., 427; *In re Frank*, 95 Fed., 635; *Clarke v. Larremore*, 188 U. S., 488.

3. **SAME.** Attaching creditor can hold, if proceeds received by him before petition filed.

But if such attaching creditor, in good faith and without collusion, succeeds in subjecting the property to the payment of his debt, and receives the proceeds of it before the petition is

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filed, and he is not asking to share in the assets of the debtor in the hands of the trustee, he cannot be compelled to surrender the advantage he has obtained.

Case cited and approved: *Botts v. Hammond*, 99 Fed., 916.

FROM McMINN.

Appeal from the Chancery Court of McMinn County.
—T. M. M'CONNELL, Chancellor.

BURKETT, MANSFIELD & MILLER, for Farrell, Trustee.

ALLEN & IVINS, for W. B. Lockett & Co.

MR. JUSTICE SHIELDS delivered the opinion of the Court.

Complainant brings this bill as trustee in bankruptcy of H. L. Ware, to recover from the defendants \$141.46 which they had realized from a sale of the property of the bankrupt under legal proceedings begun and consummated within four months before the filing of the petition in bankruptcy.

Complainant charges in his bill that on January 3, 1905, W. B. Lockett & Co. brought a suit before a justice of the peace, against H. L. Ware, and caused an attachment to be issued and levied upon his personal property; that the case proceeded to judgment and the prop-

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erty attached was sold and the proceeds thereof, after paying the costs of the case, \$141.46, was paid over to the plaintiffs in that action.

It further charged that within four months after the levy of the attachment H. L. Ware filed a petition in voluntary bankruptcy, in which he scheduled debts amounting to \$700, and assets amounting to \$4, in the district court of the United States for the eastern district of Tennessee; that at a meeting of the creditors, complainant Farrell was appointed his trustee in bankruptcy, and was duly qualified and vested with all the duties and powers granted to trustees in such cases.

It is also charged that the said Ware was insolvent when said action was begun and attachment sued out and levied upon his property; that complainant made demand of the defendants for the money received by them, which was refused, and that he brings this bill to recover the same.

The answer admits the charges of facts contained in the bill, but denies that these facts entitle the complainant to any relief. The defendants further say in their answer that they expended the sum of \$30 in the payment of attorney's fees in the action brought by them against H. L. Ware, and that if they are not entitled to retain all the money received by them in that case they should be allowed a credit for this sum as a necessary expense in collecting it.

The chancellor decreed against the defendants for \$111.46, and interest, allowing them a credit for \$30, on

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account of attorney's fees paid by them. From this decree both complainant and defendants have appealed and assigned errors.

Complainant claims the money received by the defendants in their suit against Ware under section 67f of the federal bankrupt act of 1898 (Act July 1, 1898, c. 541, 30 Stat., 565 [U. S. Comp. St., 1901, p. 3450]), and the decision of the cause depends upon a construction of that section. It is as follows:

"That all levies, judgments, attachments, or other liens obtained through legal proceedings against a person, who is insolvent at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void, in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien, shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall on due notice order that the rights under such levy, judgment, attachment, or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate, as aforesaid. And the court may order such conveyances as shall be necessary to carry the purposes of this section into effect, provided that nothing herein contained shall have the effect to destroy or impair the title obtained by such levy, judgment, attachment, or other levy of a bona fide purchaser for value, who shall have

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acquired same without notice or reasonable cause for inquiry."

This section applies to voluntary as well as to an involuntary petition in bankruptcy. *In re Darwin*, 117 Fed., 407, 54 C. C. A., 581.

It has been held in several cases that the trustee of a bankrupt is entitled to the proceeds of a sale of the property of the bankrupt had under judgment, attachment, levy, or other lien obtained through legal proceedings against one who is insolvent within four months next before filing the petition in bankruptcy remaining at the time the petition was filed in the hands of the sheriff, receiver, or other officer making the sale. And, if the money realized by the defendants in their action against H. L. Ware had not been received by them when the latter filed his petition, they would be liable to the trustee for it, less their reasonable and necessary attorney's fees expended in its collection. *In re Kenney* (D. C.), 95 Fed., 427; *In re Frank* (D. C.), 95 Fed., 635; *Clarke v. Larremore*, 188 U. S., 488, 23 Sup. Ct., 363, 47 L. Ed., 555.

But we have been cited to no case in which it has been held that a trustee in bankruptcy can recover of a *bona fide* creditor of the bankrupt, although insolvent, money which he has received as a result of his diligence in prosecuting a legal proceeding against the debtor, although it was begun within four months next before the petition in bankruptcy was filed, where it was paid over to him by the officer before the filing of the petition. We

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do not think that the section of the bankrupt law invoked covers such a case. There is no levy, judgment, attachment, or other lien to be made void at the time the petition is filed. These proceedings have been concluded and ended, and are no longer in existence, nor has the creditor the property of the bankrupt in his hands; that is in the possession of the *bona fide* purchaser who has a right to retain it. We think the lien contemplated by the statute is one that is alive and yet existing. This is evident from the clause providing for the preservation of liens for the benefit of the estate. This section of the bankrupt law is exceedingly drastic, and we do not think it ought to be extended beyond its plain terms, and it would be necessary to do this in order to grant the complainant a decree in this case.

The case of *Botts v. Hammond*, decided by the circuit court of appeals for the fourth circuit, is somewhat analogous to this one. It was there held that where the proceeds of the property of an insolvent bankrupt sold under attachment and proceeding in the nature of a general creditors' bill were distributed among his creditors, the proceeding having been begun and the distribution made within four months next before the filing of the petition in bankruptcy, the trustee could not recover from the creditors the several sums received by them. *Botts v. Hammond*, 99 Fed., 916, 40 C. C. A., 179.

And in *Clarke v. Larremore*, *supra*, where it was held that the trustee in bankruptcy was entitled to the fund realized from a sale of the bankrupt's property yet re-

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maining in the hands of the sheriff, it is said :

"A different question might have arisen if the writ had been fully executed by payment to the execution creditor. Whether the bankruptcy proceedings would then so far affect the judgment and execution, and that which was done under them, as to justify a recovery by the trustee in bankruptcy from the execution creditor is a question not before us, and may depend on many other considerations. It is enough now to hold that the bankruptcy proceedings seized upon the writ of execution while it was still unexecuted and released the property which was held under it from the claim of the execution creditor."

We think it is evident from this that the court was of opinion that in this character of cases a trustee in bankruptcy could not recover.

We are therefore of the opinion that where a creditor of an insolvent debtor in an action free from collusion succeeds in subjecting the property of his debtor to the payment of his debt, and receives the proceeds of it before the petition is filed, although his action was brought within four months of that time and is not asking to share in the assets of the debtor in the hands of the trustee, he cannot be compelled to surrender the advantage which he has obtained. We do not think that section 67f of the bankrupt law has any application to a case of this character.

The judgment of the chancellor is therefore reversed, and the bill of complainant dismissed, with costs.

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C. N. O. & T. P. RAILWAY CO. v. HARRIS.

*(Knoxville. September Term, 1905.)***1. COMMON CARRIER. Contract of carriage—Effect of ticket.**

It is well settled that the actual contract between the carrier and passenger must govern, and not the recitals of a ticket issued by the carrier to a passenger. The ticket is a mere evidence of the contract, issued by the carrier and cannot be controlled by the passenger. (*Post*, pp. 511, 512.)

Case cited and approved: *O'Rourke v. St. Ry. Co.*, 103 Tenn., 124.

Case distinguished: *Railroad v. Fleming*, 14 Lea, 123.

2. SAME. Same. Case in judgment.

Plaintiff purchased from an initial carrier transportation over its and the defendant's lines and received an order on the agent of defendant for a ticket on that line. She was unable to procure a ticket over the line of defendant, a connecting carrier, because of the negligence of its agent. *Held*: defendant was bound to transport plaintiff safely and was liable for indignities offered her by its conductors. (*Post*, pp. 502-512.)

3. SAME. Liability for insults to passengers.

A common carrier is liable in damages to a passenger not only for injuries to his person by the violence of its employees, but likewise for injuries to his feelings by the indecent and insulting language of its employees, upon the ground that its contract obligates the carrier, not only to transport the passenger, but to guarantee him respectful and courteous treatment from both passengers and its own employees. (*Post*, p. 512.)

Case cited and approved: *Knoxville Traction Co. v. Lane*, 103 Tenn., 376.

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4. SAME. Damages for indignities to passengers.

The evidence in this case, being an action against a carrier for personal indignity offered a passenger by the conductors of the carrier, was examined and it was held that a verdict for the amount shown in the opinion would not be set aside as excessive.

FROM ROANE.

Appeal in error from the Circuit Court of Roane County.—GEORGE L. BURKE, Judge.

OWINGS & NICHOLAS, for the Railway Company.

BROWN & CASSELL and ASBURY WRIGHT, for Harris.

MR. JUSTICE MCALISTER delivered the opinion of the Court.

The plaintiff below recovered a verdict against the railroad company for the sum of \$1,800 as damages for the breach of a contract of carriage, and for personal indignities offered her while a passenger on one of defendant's trains. On motion for a new trial a remittitur of \$303 was suggested by the trial judge, which was accepted by the plaintiff, and a judgment pronounced on the verdict of the jury against the defendant company for the sum of \$1,497. The company appealed, and has assigned errors.

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The record reveals that on the 15th of June, 1903, Mrs. Harris purchased from the agent of the Southern Railway Company at Asheville, North Carolina, transportation from Asheville to St. Louis and return, paying therefor the sum of \$20. The plaintiff was given a round-trip ticket over the Southern Railroad to Harriman Junction, and in addition an order on the ticket agent of the Cincinnati, New Orleans & Texas Pacific Railway Company at Harriman Junction for a first class round-trip ticket from Harriman Junction to St. Louis, Mo., via the Cincinnati, New Orleans & Texas Pacific Railway. The plaintiff left Asheville about 12 m. over the Southern Railroad, and reached Harriman Junction the same evening at about 10 o'clock. She immediately repaired to the ticket office of the Cincinnati, New Orleans & Texas Pacific Railway at said point for the purpose of getting a ticket to St. Louis, Mo., and return, in exchange for said order. It appears that the regular ticket agent was not in his office, and, although the train was delayed at Harriman Junction for over an hour on account of a wreck, and the plaintiff made several efforts to find said agent, he failed to put in an appearance. However, some one in the second story of the office probably the train dispatcher, told her that she could get a ticket by presenting her order to the ticket agent of the Cincinnati, New Orleans & Texas Pacific Railway at Oakdale, a point on defendant's line about two miles from Harriman Junction. This person also stated to the plaintiff that he would telegraph

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said agent at Oakdale to furnish her a ticket, and further instructed her to hand her order to the sleeping-car porter and request him to exchange it for the ticket when the train arrived that night at Oakdale. The plaintiff accordingly turned her order over to the sleeping-car porter, who promised to exchange it as directed. The plaintiff thereupon went to her berth in the sleeping car, and retired for the night. It appears that, when the train reached Oakdale, it stopped for such a short time that the sleeping-car porter was prevented from procuring the ticket as directed, and afterwards returned the order to plaintiff, explaining his inability to have it exchanged for lack of time.

The record discloses that the plaintiff was a widow traveling alone with her son, a boy of tender years. She testifies that some time after midnight the conductor of the train, without giving her any warning, opened the curtains of her berth, where she was disrobed, and, throwing the light from his lantern into her face demanded in a rude and angry manner the payment of her fare. The plaintiff explained to him that she had purchased a round-trip ticket at Asheville, North Carolina, to St. Louis, Missouri, but had been prevented, without fault on her part, from getting her ticket order converted into a regular ticket at Harriman Junction. She further testified that the conductor would listen to no explanation, but demanded her fare under penalty of being put off the car. She thereupon paid him the sum of \$3 to cover the

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fare of herself and son from that point to Somerset, Kentucky, where this conductor was to leave the train. The plaintiff testified that at Somerset, Kentucky, the conductor, West, turned all his tickets over to another conductor, one O'Connell, and that neither one of these conductors made any effort to have her exchange order converted into a regular ticket, although West admits that he told O'Connell about the circumstances. According to the testimony of the plaintiff, after the train left Somerset the new conductor, O'Connell, came immediately to her berth and demanded the payment of her fare. Plaintiff explained to this conductor why she had not procured a ticket in exchange for the order. He became abusive, and threatened to put her off the train, and said "she was trying to beat her way—trying to steal a ride—that he had met people like this before, and that he was not going to fool with her." "He said he would put me and my child and baggage off at a place where there was no place to stop. He further stated that he would have an officer for me at Lexington, and put me off the train."

Robert Mitchell, who was a passenger on the train, corroborates the statement of Mrs. Harris as to her treatment by conductor O'Connell. This witness stated that he was sent for by Mrs. Harris about 6 o'clock a. m. on the morning of June 16th, and she related the fact that the conductor of the train at about 3 o'clock a. m., threatened to put her off the train and compelled her to pay fare. While he was talking to her about the matter,

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the train conductor came along and demanded of Mrs. Harris, in his presence, her ticket. He (Mitchell) explained to the conductor that she had a cash fare receipt calling for a ticket, and told him that he had tried along with Mrs. Harris, to get the ticket for her at Harriman Junction, Tenn., but that they could not find any agent. The conductor said he could not tell about that; that he could not let her ride without a ticket, notwithstanding the fact that she showed him the receipt for which she had paid \$20 at Asheville, North Carolina, for transportation over this road to St. Louis and return. The conductor became very abusive and ugly, and said that he would put her off the train at the first station; that she was trying to beat her way; that he had been told by the first conductor (leaving the train probably at Somerset) that he did not propose to let her ride any further, but would put her off at the next station. The conductor and he (Mitchell) had a few words about the matter. The rest of the passengers began to crowd around, and the conductor made some very cutting remarks about Mrs. Harris trying to steal a ride. "He said again for her to get ready and get off the train at the next station, naming a place which I have forgotten, and which we were then nearing. I called the conductor to the front of the car and arraigned him bitterly for such harsh treatment of a lady. He said to me, 'Why don't you pay her fare?'" I told him I would if he would put her off; that I would pay her fare, and she would then make trouble for the railroad com-

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pany. The conductor then said, 'I have never put a woman off the train yet,' and that his wife would rebuke him if he ever did. I suggested to the conductor that he get her ticket issued at the first station. When we came to Lexington he did this, and I went with him to the ticket agent (Queen & Crescent Route) and explained all the circumstances to the agent. Said agent then issued the ticket, and remarked, 'I am surprised the way this lady has been abused.' . . . When Mrs. Harris sent for me about 6 o'clock in the morning, I found her very nervous and excited, and extremely worried about the way the conductor had treated her, and she continued very much worried and nervous until we parted on the journey at Indianapolis. Mrs. Harris was polite to the conductor, and, so far as I know, gave no provocation for such treatment."

It is obvious from this statement of the case, without further elaboration of the facts, that there is sufficient evidence to sustain a verdict against the company for personal indignities offered this passenger by the conductors of the trains.

There was no controversy in the court below as to the authority of the Southern Railway to bind the Cincinnati, New Orleans & Texas Pacific Railway by contract for transportation of defendant over its line to St. Louis, Missouri. It was admitted by counsel in open court below that the Southern was its agent and had a right to issue the exchange ticket or order.

The first, second, and third assignments of error raise

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cognate questions, and will be considered together. These assignments are based on the charge of the trial judge to the effect:

(1) That a failure of defendant company to have an agent at Harriman to exchange plaintiff's order for a ticket was an act of negligence, and, if said agent instructed plaintiff to get her exchange perfected at Oakdale, it was the duty of defendant company to give plaintiff an opportunity to make such exchange.

(2) If plaintiff failed to get exchange through no fault of hers, her right to continue her journey on that particular train would not be lost.

(3) If defendant's agent at Harriman Junction instructed plaintiff to place said exchange order in the hands of the porter, who would make the exchange for her at Oakdale, she had a right to believe the proper exchange would be made, and would have the right to remain on the train without the payment of additional fare.

It is insisted these instructions were erroneous for the reason that plaintiff had no ticket, and the exchange order expressly recited on its face that it was not good on trains. It is said the effect of the judge's charge was to tell the jury that the plaintiff, after having failed to see the company's agent at Harriman, and because he was not present to exchange or give her a ticket on the order, could then treat the order as a ticket, and thereafter ride on it. It is argued by counsel for the

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company that under the conditions stated plaintiff had two courses open to her:

(1) She could have elected not to proceed without a ticket, and brought suit for the breach of the contract in not supplying her with a ticket on the order, or,

(2) She could have continued on the train, paying her fare, and suing for the recovery of the money.

But it is insisted that, since the order itself recited it was not good on trains, plaintiff had no right to continue her journey on it, and that the conductor could lawfully demand payment of fare. In support of this view counsel cite *McKay v. Ohio River R. R. Co.*, 34 W. Va., 65, 11 S. E., 737, 9 L. R. A., 132, 26 Am. St. Rep., 913, in which it was held that, if a passenger pay a railroad agent fare for a certain trip and, by mistake of the agent, is given a ticket not answering for that trip, but one in an opposite direction, and the conductor refuses to recognize such ticket and demands fare, which the passenger fails to pay, ejection of the passenger from the train without unnecessary force will not be ground of action against the company as for tort, but the action may and must be based on the breach of the contract to convey the passenger. See, also, *Trezona v. Chicago Great Western Railway*, 107 Iowa, 22, 77 N. W., 486, 43 L. R. A., 136. Counsel also relies on the case of *Mosher v. St. Louis, Iron Mountain & Southern Railway*, 127 U. S., 390, 8 Sup. Ct., 1324, 32 L. Ed., 249, and *Boylan v. Hot Springs Railroad Company*, 132 U. S., 146, 10 Sup. Ct., 50, 33 L. Ed., 290.

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The argument of counsel for the company is that neither of the conductors on defendant's train could know what defendant in error did at Harriman Junction, or whether there was an agent there to give her a ticket, or whether she was the person who had purchased the ticket in the first instance at Asheville, North Carolina. It is said that conductors cannot be expected or required to carry on an investigation or try the facts necessary to be ascertained in such a matter; that it is their duty to look after the trains, take up tickets, and collect fare from the passengers, and if a passenger has no ticket, to eject him from the train upon his refusal to pay fare. In *Railroad v. Fleming*, 14 Lea, 128, it was said by this court that a passenger who loses or mislays his ticket after entering the cars has no right to supply its place by offering testimony that he actually bought the ticket and lost it, and the conductor or other employee, whose duty it is to take up the ticket, cannot be required to hear testimony on the subject, or to determine its weight at the peril of the company, under a rule which gives him no discretion. In the *Fleming Case* the passenger was at fault in losing or misplacing his ticket, but in the present case the passenger was at no fault whatever, but the negligence was wholly that of the company and its agents. In the later case of *O'Rourke v. St. Railway Company*, 103 Tenn., 124, 52 S. W., 872, 46 L. R. A., 614, 76 Am. St. Rep., 639, it was held that if a passenger on a street car, who has paid full fare and complied with all other reasonable and valid conditions

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to entitle him to passage, is expelled by the conductor on account of a defect in his ticket or transfer check, not imputable to any fault of the passenger, but solely to the fault and negligence of the company's agent who issued it, the passenger can maintain an action for damages for such expulsion, and cannot be required to pay a second fare, and seek redress by action for breach of contract or for negligence of agent who issued ticket. The actual contract, not the ticket, controls the rights and duties of carriers and passengers. The ticket is but evidence of the contract. It is the act of the carrier over which the passenger has no control. The carrier is alone responsible for mistakes therein and their consequences. The passenger has a right to presume and rely upon the ticket as correctly expressing the contract.

It will be observed that the rule announced in the latest deliverance of this court on this subject is that the actual contract between the carrier and passenger must govern, and not the recitals of the ticket, which, is the mere evidence of the contract, and which is issued by the carrier and cannot be controlled by the passenger. It was said in *O'Rourke v. Railway*, *supra*, that:

"The undoubted right of a carrier to require passengers to procure and present tickets does not imply the right to expel passengers because the tickets they offer chance to be defective or void without their fault. . . . To justify expulsion of passengers on account of defective tickets, made so by the carrier's fault, is to visit upon the innocent passenger the consequences of the carrier's negligence."

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We are of the opinion that the principles enunciated in the *O'Rourke Case* are applicable to the facts of this case, and, although the passenger was not ejected from the train, there was, nevertheless, a breach of the contract of carriage by the personal indignity offered the passenger by the conductors of defendant's trains. Since the failure on her part to procure a ticket in exchange for her order was not attributable to any fault on her part, but was wholly the result of the negligence of the company and its agents, she was still entitled to ride, and the relation of carrier and passenger still existed between them. The carrier is under an obligation, not only to transport the passenger safely, but to protect him from trespasses or insulting conduct, either from other passengers on the train or its own employees.

In *Knoxville Traction Co. v. Lane*, 103 Tenn., 376, 53 S. W., 557, 46 L. R. A., 549, it was held by this court that a common carrier is liable in damages to a passenger, not only for injuries to his person by the violence of its employees, but likewise for injuries to his feelings by the indecent and insulting language of its employees, upon the ground of breach of its contract that obligates the carrier, not only to transport the passenger, but to guarantee him respectful and courteous treatment, not only from strangers, but from its own employees.

We are further of opinion that the verdict of the jury, in view of the facts disclosed in this record, was not excessive—at least not so excessive as to evince partiality, prejudice, corruption, or unaccountable caprice on the part of the jury.

Let the judgment be affirmed.

HALL & HAWKINS v. NATIONAL FIRE INSURANCE COMPANY.

(*Knowville*. September Term, 1905.)

1. **INSURANCE.** Liability for explosion caused by fire in the property insured, though liability is excluded by the policy, when.

The weight of authority is to the effect that where a fire occurs in the property insured, and an explosion takes place therein during the progress of the fire, the effects of which are covered by the policy, and such explosion is a mere incident of the preceding fire, such fire is treated as the efficient cause, and the whole loss is within the risk insured, although the policy in terms excludes liability for the loss by explosion. (*Post*, pp. 517-521.)

Cases cited and approved: *Mitchell v. Insurance Co.*, 57 Fed. Rep., 294; *Washburn v. Insurance Co.*, 2 Fed. Rep., 304; *Washburn v. Insurance Co.*, 2 Fed. Rep., 633; *Washburn v. Insurance Co.*, 17216 Fed. Cases; *Washburn v. Insurance Co.*, 17212 Fed. Cases; *Renshaw v. Insurance Co.*, 33 Mo. App., 394; *Dorsey v. Insurance Co.*, 56 Md., 70; *Insurance Co. v. Foote*, 22 Ohio St., 340, 348; *Scripture v. Insurance Co.*, 10 Cush. (Mass.), 357; *LaForce v. Insurance Co.*, 43 Mo. App., 518; *Gas & Electric Co. v. Insurance Co.* (Mass.), 20 L. R. A., 297.

Cases cited and distinguished: *Hustace v. Insurance Co.*, 175 N. Y., 292; *Insurance Co. v. Foote*, 22 Ohio St., 348; *Heuer v. Insurance Co.*, 144 Ill., 393; *Cohn v. Insurance Co.*, 70 S. W., 259; *Heffron v. Insurance Co.*, 132 Pa. St., 530.

2. **SAME.** No liability for an explosion caused by fire in a nearby building, where such liability is excluded in the policy, when; case in judgment.

Where a policy of fire insurance provides against liability for explosion of any kind, except where a fire ensues, and in that 115 Tenn.—33

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event for the damages by fire only, there is no liability for an explosion caused by a fire in a nearby building, where no fire ensues in the property insured as a result of such explosion. (*Post*, pp. 514-525.)

Cases cited and approved: Cabalero & Basualdo v. Insurance Co., 15 La. Ann., 217; Insurance Co. v. Roost, 45 N. E., 1097, 36 L. L. R. A., 236; Everett v. Assurance Society, 115 E. C. (19 C. B. N. S.), 126.

8. LOGIC. Legal conclusions cannot always be reached by.

A deduction may seem to be sound in an abstract sense, but legal conclusions cannot always be safely reached by pressing the processes of logical illation to their ultimate results. (*Post*, p. 521.)

FROM KNOX.

Appeal from the Chancery Court of Knox County.—
JOSEPH W. SNEED, Chancellor.

JOHN W. GREEN, for complainants.

WEBB, M'CLUNG & BAKER and CORNICK, WRIGHT &
FRANTZ, for defendant.

MR. JUSTICE NEIL delivered the opinion of the Court.

Complainants' bill states the following case:

On the 6th day of September, 1904, the defendant company issued to the complainants a policy containing among other things, the following provisions: "The

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National Fire Insurance Company of Hartford, Conn., in consideration of the stipulations herein named, and of \$19.38 premium, does insure Hall & Hawkins, for the term of one year from the 6th day of September, 1904, at noon, to the 6th day of September, 1905, at noon, against all direct loss or damage by fire, except as herein provided, to an amount not exceeding \$1,000, on the following described property, located and contained as described herein (describing property). This company shall not be liable for loss occasioned directly or indirectly by invasion, insurrection, riot, civil war, or commotion, or military, or usurped power, or by order of any civil authority; or by theft, or by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire, or when the property is endangered by fire in neighboring premises, or (unless fire ensues, and in that event for the damage by fire only) by explosion of any kind or lightning; but liability for direct damage by lightning may be assumed by specific agreement hereon."

The property insured consisted of a stock of furniture, house-furnishing goods, rugs, carpets, linoleum, oil cloth, curtains, and other merchandise which the complainants kept for sale in their place of business at Nos. 418 and 420 Gay street, Knoxville, Tennessee.

On November 12, 1904, between two and three o'clock in the morning a fire, originating from an unknown cause, broke out in the second building south of complainants' storehouse on the same side of the street and

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between thirty and forty feet distant, occupied by the Woodruff Hardware Company. After this fire had been in progress for the space of one hour, and while it was raging fiercely and beyond control, a terrific explosion, following as an incident of the fire, and shaking the whole city and the country for miles around, occurred in the said storehouse of the Woodruff Hardware Company, this explosion having been caused by the fire igniting powder and dynamite stored in the building of the Woodruff Hardware Company. The fire itself did not reach the store occupied by complainants, but it produced the explosion, which resulted in breaking, injuring, and damaging complainants' stock to the extent of more than \$5,000. The explosion referred to was wholly due to the preceding fire.

The other allegations of the bill need not be noticed, as they are not drawn in question.

The demurrer, so far as it is necessary to notice the defenses made therein, makes two points; firstly, that the facts stated in the bill fail to show any direct loss by fire, secondly, that it is shown in the bill that an explosion occurring in a building forty feet distant caused the injury to complainants' goods, and that no fire ensued upon the explosion, and that such loss was not within the terms of the policy.

The chancellor overruled the demurrer, whereupon the defendants, by leave of the court, prosecuted an appeal to this court, and have here assigned errors.

We shall not dispose of the two grounds of demurrer

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in the exact form in which they are stated, but shall consider, so far as may be necessary, the substance of each of them.

1. There is some controversy in the authorities upon the question whether, under a policy framed like the one in suit here, an explosion occurring during the progress of a fire should be treated as a mere incident of the fire, the latter being regarded as the efficient cause of the injury, or whether it should be excepted out of the operation of the policy.

The weight of authority is to the effect that where the fire occurs in the property insured, and an explosion takes place therein during the progress of the fire, the effects of which are covered by the policy, and such explosion is a mere incident of the preceding fire, the latter is treated as the efficient cause, and the whole loss is within the risk insured, although the policy in terms excludes liability for loss by explosion. *Mitchell v. Potomac Ins. Co.*, 183 U. S., 51, 52, 53; *Waters v. Ins. Co.*, 11 Pet., 213, 218; *Amer. Steam Boiler Ins. Co. v. Chicago Sugar Refining Co.*, 57 Fed. Rep., 294, 21 L. R. A., 572; *Washburn v. Farmers' Ins. Co.*, 2 Fed. Rep., 304; *Washburn v. Miami Valley Ins. Co.*, 2 Fed. Rep., 633; *Washburn v. Ins. Co.*, 17216 Fed. Cases; *Washburn v. Ins. Co.*, 17212 Fed. Cases; *Renshaw v. Ins. Co.*, 33 Mo. App., 394; *Renshaw v. Ins. Co.*, 23 Am. St. Rep., 910; *Dorsey v. Ins. Co.*, 56 Md., 70, 40 Am. Rep. 403; *Ins. Co. v. Foote*, 22 Ohio St. Rep., 340, 348, 10 Am. Rep., 735; *Scripture v. Lowell Mut. Fire Ins. Co.*,

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10 Cushing (Mass.), 357; *LaForce v. Williams City F. Ins. Co.*, 43 Mo. App., 518, and see *Lynn Gas & Elec. Co. v. Meriden Fire Ins. Co.* (Mass.), 20 L. R. A. 297.

In May on Insurance, it is said: "Where the policy excluded liability 'for loss by lightning or explosion of any kind unless fire ensues, and then for damages by fire only,' it was held in a case where it appeared that vapor evolved from material in process of manufacture, coming in contact with a burning lamp, exploded, tearing off the roof, shattering the walls, and damaging the machinery, upon which a fire supervened, that the insurers were liable for the damage done by the fire, but not for that done by the explosion. If, under such a policy, fire precedes the explosion, the entire loss is to be attributed to the fire, though the explosion is destructive." *Id.*, Vol. 2 (4th Ed.), p. 956. In a note upon the same page, it is said: "If a fire occurs by a cause within the policy and an explosion takes place as an incident to the fire so as to increase the loss, the whole damage is within the policy, although it contains an exemption from liability for the explosion," citing *Insurance Co. v. Dorsey*, *supra*.

In Clements on Insurance, it is said: "When explosions or explosive effects occur after the commencement of a fire or during its progress and as an incident of a fire or a result of it, the whole loss is a loss by fire within the meaning and protection of the policy, notwithstanding the destructive effect of the explosion; it is ordinarily a question of fact; if the explosion pre-

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cedes the fire the company is liable for the damage by fire only, and not for that caused by the explosion." *Id.*, p. 123.

In Elliott on Insurance, it is said: "The standard form provides for liability for damage occasioned by fire which results from an explosion and exempts the insurer from liability for damages caused by the explosion itself. The loss by explosion must be distinguished from that caused by the subsequent fire. Under this provision the insurer is liable for the loss when the explosion is the result of an antecedent fire. *Id.*, p. 212.

In Joyce on Insurance, it is said: "Insurers are liable upon a policy which contains a condition of this nature," (i. e., excepting liability for damages by explosions of any kind), "where fire originates in the insured premises and the fire produces an explosion which destroys the property, the entire loss in such a case is held to be a loss by fire." *Id.*, Vol. 3, p. 2532, paragraph 2593.

Again, this author says: "If the combustion and explosion are inseparably connected, if a combustible substance in the process of combustion produces explosion also, and fire is the agent throughout and there is a loss by both fire and explosion, it is held that the whole damage is covered by a policy insuring against loss by fire. *Id.*, page 2707, par. 2771.

It is insisted for defendant, following the case of *Hustace v. Phoenix Ins. Co.*, 175 N. Y., 292, 62 L. R. A., 651, that this view of the matter is erroneous, since it prac-

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tically nullifies the exception made in the policy against liability for losses occurring by explosions; that there would be no use in excepting losses caused by explosions, unless such explosions were understood to be those caused by fire, since the company would not in any event be liable under a fire policy for an explosion not produced by fire.

Thus stated, the objection is a very plausible one. However, the cases which we have cited go upon the theory that in order to satisfy the terms of a policy insuring against direct loss by fire, the latter must always be regarded as the efficient cause, where its effects are produced in direct sequence, though one of the incidents of that sequence may be an explosion, and that it could not have been intended to nullify such predominant cause. There is room for the exception in favor of losses produced by explosion, notwithstanding this construction, in view of the fact that explosions are frequently produced by flame, as by a lighted match, a gas jet, a lighted lamp, fire from a furnace, and the like, as shown in *Insurance Co. v. Foote*, 22 Ohio St. Rep., 348, 10 Am. Rep., 735; *Heuer v. Northwestern Nat. Ins. Co.*, 144 Ill., 393, 19 L. R. A., 594; *Cohn v. Nat. F. Ins. Co.*, 70 S. W. Rep., 259; *Heffron v. Kittanning Ins. Co.*, 132 Pa. St., 580, which, although in fact forms or manifestations of fire, yet do not fall within the meaning of the latter expressions, as used in the rule above stated. The foregoing instances and others had been the occas-

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ion of sufficient doubt to render necessary the introduction of the clause referred to.

2. It is insisted by counsel for complainants that since an explosion produced in progress of a precedent fire is held to be the result of the fire, and the loss by such explosion a loss by fire, damage produced thereby in neighboring buildings should be treated like damage by smoke and water, destruction by the falling of buildings, or other injuries by fire agencies without actual ignition in their operation upon adjoining buildings, and that the element of distance is unimportant. Abstractly speaking, the deduction seems sound, but legal conclusions cannot always be safely reached by pressing the processes of logical illation to their ultimate results. The weight of authority is against complainants' contention. *Cabalero & Basualdo v. Home Ins. Co.*, 15 La. Ann., 217; *Germania Fire Ins. Co. v. Henry Roost*, 45 N. E., 1097, 36 L. R. A., 236; *Everett v. London Assurance Society*, 115 E. C. (19 C. B. N. S.), 126; *Clement on Fire Ins.*, p. 123; *Joyce on Ins.*, Vol. 3, secs. 2586 and 2587.

In the case of *Cabalero & Basualdo* it appeared that the company had issued to the plaintiffs a fire policy agreeing to make good to them all such loss or damage as should happen by fire to a building in Brownville, Texas, during the period of one year; that a fire broke out about 180 or 200 feet distant in a building containing a quantity of gunpowder and in about thirty min-

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utes the gunpowder exploded; that this explosion produced such concussion of the air as to crack the walls of the plaintiffs' building and brick arches, drive in the windows and blinds, loosen the plastering and slates, resulting in an injury of \$950.00. The fire continued in the town for forty-eight hours, but did not reach the building in question, this being entirely unharmed except from the concussion.

After stating these facts, and conceding that where a fire occurs upon the premises insured by which an explosion of gunpowder takes place, the insurer is responsible, on the ground that the loss is the direct consequence of the combustion, the court continues: "If now the question were to be asked any one acquainted with the law of insurance, whether an injury could be considered as occasioned by fire, where it had only been effected by the air put in motion by the explosion of gunpowder, and the fire itself had not touched the building, we think the answer would be "No," because the insurance company only bound itself to answer for damage done by the element of fire, and not by injury done by any other element. But it is replied by the jurist that the law looks upon the question in a different light. It seeks for the first effect, the cause of the loss, and that is the *causa proxima*, however many other agencies may have intervened. Here there would have been no concussion of the air without the explosion of gunpowder, and the gunpowder would not have exploded without taking fire, and producing instantaneous ex-

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plosion, by which gases were evolved and expanded to set air in motion.

"Perhaps, after all, it might be safe here, as in other contracts, to inquire whether the loss was within the reasonable intendment of the parties when they made the contract. Did they intend by an insurance against fire, to cover losses arising from the concussion of the air, produced by the explosion of gunpowder upon the premises of other persons than the insured? We think such an extraordinary result could not have been contemplated by the parties. We do not think insurance companies can be considered responsible for the consequences of the combustion of gunpowder, unless that combustion has happened in the premises insured, or the gunpowder is itself, with other merchandise, covered by the policy."

In the case of *Henry Roost*, it appeared that the house which was the subject of the insurance, stood on the west side of a street forty feet wide and twenty-one feet from the street; that on the east side of the street and opposite this house was located a powder house; that neither plaintiff nor defendant had any interest in or control over this powder house; that before the day on which the fire occurred, which was January 3, 1890, there were stored in the powder house two tons of powder, and on January 3, the powder house was struck by lightning, causing an explosion, which destroyed the property of Roost. The policy contained a clause, insuring "against any loss or damage caused by lightning,

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to the interest of the assured in the property described." The policy also contained a provision that it did not "apply to or cover any loss occasioned by explosion, unless fire ensues, and then the loss or damage by fire only." The question was whether the loss should be treated as one produced by lightning within the terms of the policy upon that subject, which we have quoted. After discussing the matter at some length and arriving at a conclusion adverse to the liability, the court continued: "The conclusions stated are sustained by abundant authority.. True it is that cases are to be found which declare principles of construction, which, if applied here, would make the company liable for this loss, if its liability were measured wholly by the lightning clause. But in no case which has come within our observation, and we have examined a great many, has a liability been found to attach where there was a provision excluding liability for loss by explosion, and the loss was caused by fire, or, as here, by lightning, taking effect in a distant building, the damage being wrought to the insured property by an explosion produced by the fire, or lightning, without either of the latter agencies coming in contact with the insured property."

In *Everett's Case* it was held that no liability attached under the clause of a policy providing against "such loss or damage as shall or may be occasioned by fire to the property" insured where it appeared that the damage which accrued to the premises of the plaintiff was occasioned by a concussion or disturbance of the atmos-

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phere by an explosion of a large quantity of gunpowder at a magazine about a half mile distant from them.

In Clement on Fire Insurance, it is said: "Damage caused by a concussion of air resulting from an explosion in another building is not covered, even though such explosion was caused by fire, but the company may be liable for the damage by fire when fire ensues." *Id.*, p. 123.

In Joyce on Insurance, it is said: "If the company excepts a loss by explosion, it is not liable for any loss or damage which the insured premises may sustain, which is the mere result of the concussion of an explosion upon other premises than those insured." *Id.*, Vol. 3, sec. 2587.

On the grounds stated, we are of the opinion that the chancellor was in error in overruling the demurrer. His decree must therefore be reversed, and the bill dismissed with costs.

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SOUTHERN RAILROAD COMPANY v. HAMBLEN COUNTY.

(Knoxville. September Term, 1905.)

1. **TAXATION.** Special tax levied by a county must show its purpose, or it is void, and a distress warrant to collect it will be superseded and quashed.

The order of the county court levying a special tax should state the purpose for which the levy is made, and a levy of a special tax without showing the purpose thereof is void, and a distress warrant issued to collect such tax will be superseded and quashed.

Code cited and construed: Secs. 493, 503, 1394, 5992, 6041, 6050, 6053 (S.); secs. 459, 469, 1166, 4954, 4990 (M. & V.); secs. 402, 411, 970, 4179, 4180, 4186 (T. & S. and 1858).

Constitution cited and construed: Art. 2, sec. 29.

Cases cited and approved: McLean v. State, 8 Hels., 269; Grant v. Lindsay, 11 Hels., 665, 666; Winston v. Railroad, 1 Bax., 60, 76; Railroad v. Franklin Co., 5 Lea, 707; Railroad v. Wilson, 90 Tenn., 271; Wallace v. Crook, 91 Tenn., 388; Colburn v. Railroad, 94 Tenn., 43; Shelby Co. v. Exposition Co., 96 Tenn., 653; Burnett v. Maloney, 97 Tenn., 697; Kennedy v. Montgomery Co., 98 Tenn., 179; Judges' Salary Cases, 110 Tenn., 388; Akin v. State, 112 Tenn., 605.

2. **SAME.** Same. Levy of special tax to pay general debts, without legislative authority, is void; confusion of levy of special with general tax renders whole void.

A special tax levied by a county to defray the expenses incurred in suppressing an epidemic of smallpox, jail improvements, and to repay a loan made to the county by the sinking fund commissioners, is void, because these are general county purposes, and a special tax for these purposes has not been authorized

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by the legislature, except for repairs made upon the county jail, which is so confused with the other matters that it cannot be separated from them. (*Post*, p. 535.)

Code, cited and construed: Sec. 503 (S.); sec. 469 (M. & V.); sec. 411 (T. & S. and 1858).

FROM HAMBLEN.

Appeal from the Circuit Court of Hamblen County.—
G. M. HENDERSON, Judge.

M'CANLESS & TATE, SUSONG & BIDDLE, and J. B. HOLLOWAY, for Railroad.

HICKEY & HICKEY, for Hamblen County.

MR. JUSTICE SHIELDS delivered the opinion of the Court.

This is a petition for certiorari and supersedeas, to stay the execution of a distress warrant issued by the clerk of the county court of Hamblen county, and levied upon the property of petitioner, to collect a special tax levied by that county in 1904, upon the ground that the tax levy is invalid for failure to show the purpose of the tax and for want of authority in the county to make the levy.

The chairman of the county court of Hamblen county,

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made and spread upon the minutes of the January term, 1904, of that court, a report containing this statement:

"There is a floating debt on the county, amounting, as near as can be ascertained, to about six thousand dollars. This debt had been created by sieges of smallpox and jail improvements, and a borrowed fund of \$2,000.00 loaned the county some years ago by the sinking fund commissioners. A tax levy of twenty cents on the hundred dollars will raise a fund sufficient, or nearly so, to pay off this floating debt. I call the court's attention to this for its consideration."

Upon the same day an order was made and entered upon the minutes in these words:

"Upon motion, it was ordered by the court that the tax levy for the year 1904 be the same as that of 1903, except that there be a special levy made of twenty cents on the hundred dollars assessed valuation."

At the next April term of the court, without noticing this order, a formal levy of taxes for that year was made and entered upon the minutes in these words:

"Be it ordered by the court that the following rate of taxes be, and the same is hereby, laid on all real and personal property and polls for the year 1904:

County tax property on the \$100	
valuation	30 cents
School tax, on the \$100 valuation	10 cents
Pauper tax, on the \$100 valuation	10 cents
Railroad tax, on the \$100 valuation	5 cents
Highway tax, on the \$100 valuation . .	10 cents

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Pike tax, on the \$100 valuation35 cents

Special tax, on the \$100 valuation....20 cents

Polls50 cents

"It is further ordered that all privileges shall be the same as that laid by the State, except that the county tax on marriage licenses shall be 50 cents, and on merchants' stock an *ad valorem* tax for county purposes the same tax as laid on real and personal property."

The special levy of twenty cents on the hundred dollars of assessed property is the item contested. The contention of the petitioner is that it is void because the purpose for which it is to be used is not stated in the levy; and, further, if extrinsic evidence can be looked to to show its purpose, as insisted by the defendant, then the defendant had no authority to levy and collect a tax for the purposes claimed.

Counties are provided for by the constitution, but their creation, and the powers with which they, for the most part may be vested, are left to the discretion of the legislature. They have been created corporations, and the justices in the county court (quarterly court), assembled, are their representatives, and authorized to act for them. Code, sec. 402; Shannon's Ed., 493.

Their powers and duties have been defined by this court in the case of *Burnett v. Maloney*, 97 Tenn., 714, as follows:

"Counties do not hold and operate under charters as do cities and other municipal corporations. They have no franchises. They make, and can make, no by-laws.

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They have the same powers and duties throughout the State. They do not have to provide waterworks and fire departments, and lights, and the hundred and one necessities for cities and towns. Their ordinary expenses are met by issuance of county warrants payable out of a general fund collected for all purpose. The occasions for extraordinary expenditures are few, such as the building of jails, courthouses, bridges and hospitals, and if it becomes necessary to incur a debt for these purposes which cannot be at once met out of the usual revenues, they must get their authority to create such debts from an enabling act of the legislature, which at the same time gives them power to provide for its payment by a special act, and no doctrine is better settled in this State than that the power thus conferred must be strictly construed and exactly followed."

The county court composed of the justices of the county, and known as the quarterly court, has no inherent power of taxation. It is the legislative council of the county created by the general assembly to act for it in such matters as it may be authorized and has only such jurisdiction and powers as are expressly conferred upon it by statute. Code, secs. 4179, 4180, 4186; Shannon's Ed., sec. 5992; *Grant v. Lindsay*, 11 Heisk., 665; *Railway Co. v. Wilson*, 90 Tenn., 271; *Wallace v. Crook*, 91 Tenn., 388; *Colburn v. Railroad*, 94 Tenn., 43; *Shelby Co. v. Exposition Company*, 96 Tenn., 653; *The Judges' Salary Cases*, 110 Tenn., 388; *Akin v. State*, 112 Tenn., 605.

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The general assembly is authorized to delegate to the several counties in the State the power to impose taxes for county purposes, which they now exercise through their representatives in the quarterly court assembled. Constitution, art. 2, sec. 29.

Counties are authorized by the general assembly to levy taxes for county purposes, usually by special provisions in the general revenue laws, enacted as a rule biennially for general county purposes and by special statutes for certain special purposes.

The general revenue law enacted in 1903, chapter 257, of the published Acts of that year, authorizes counties to levy as annual tax on every one hundred dollars of taxable property not exceeding 30 cents, exclusive of the tax for public roads and pikes and schools, and interest on the county debts, and other special purposes, and such privilege taxes as are levied by the State for State purposes.

Among the special taxes which counties are authorized to levy, are those for building and repairing court-houses, jails, and other public buildings, for constructing roads and bridges, maintaining the common schools, and the payment of the interest on the county debt. Code (Shan. Ed.), secs. 503, 1394, 6041, 6050, 6053. It is well settled, by repeated decisions of this court, that counties have no power to levy and collect a tax for any county purpose in excess of that authorized by the general assembly, and that this cannot be done merely by styling the levy "special tax." *Grant v. Lindsay*, 11

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Heisk., 666; *Railroad Company v. Franklin County*, 5 Lea, 707; *Burnett v. Maloney*, 97 Tenn., 697; *McLean v. State*, 8 Heisk., 269; *Winston v. Railroad Co.*, 1 Baxter, 60, 76.

Mr. Cooley, in his work on Taxation, says: The municipal corporations of a State having no inherent power to tax, must take such power as is conferred under the conditions and limitations that may be prescribed, and only for such purposes as may be expressed. This is fundamental. The authority is not only a delegated authority conferred by the State, but it is to be assumed that the State has given all it intended should be exercised, and the grant, like that of all special and limited grants, is to be strictly pursued. Express power to levy particular taxes, is a negation of the power to lay others; and if particular subjects of taxation are enumerated, the corporation cannot reach out to take others." Cooley on Taxation (3d Ed.), pp. 554-5.

Applying these well-settled principles of law we are of the opinion that the levy in question is void, and that the distress warrant issued to collect the tax assessed under it should be superseded and quashed. We think that an order of the county court levying a special tax should state the purpose for which the levy is made. This is necessary to enable the taxpayers to challenge it, if it be for a purpose not authorized by law, and if authorized to compel the application of the tax to the purpose for which it was in fact levied, if a diversion to some other object is attempted. In no other way can an

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unlawful exercise of the taxing power by counties be ascertained with certainty and proper application of taxes paid enforced. It would always be possible for the authorities entrusted with the power of taxation, when a levy or the application of the tax is called in question, to claim that it was for some purpose for which a special tax is authorized, or that it was levied for the purpose for which it is being used. The object of the tax should be evidenced by some record to which the people can resort for information. Without such record the taxpayers are substantially deprived of their right to know the purpose for which they are taxed, and to have the taxes paid by them applied to the purposes for which they have consented to be taxed.

This court, speaking through Mr. Justice Wilkes, has said: The taxpayers of every county have a right to know for what purpose they are being taxed, and also to know that taxes collected from them for any specific purpose are applied to such purpose and not to some other, at the discretion of county officials, and according to their ideas of public policy or expediency. The law does not provide for the mixing of special and ordinary funds, nor the supplementing of one by the other by county officials . . . but the law lays down the rule of action for county officials as well as all others, and from it they cannot depart. When the people consent to be taxed for any purpose they cannot complain, but when they are taxed for one purpose and the fund is applied to another and when they are misled

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as to the purpose for which they are being taxed, they have the right not only to complain but a remedy to redress the grievance if they apply to the courts in the proper way and at the proper time." *Kennedy v. Montgomery County*, 98 Tenn., 179, 180.

But it is said for the defendant that the purposes of this tax sufficiently appears in the statement copied from the chairman's report, entered upon the minutes of the court at the January term. We do not think so. If it be conceded that extrinsic evidence can be considered in aid of a tax levy, of which there is much doubt, that relied upon in this case is not sufficient. It is doubtful whether the order made at the January term in relation to taxes for the current year was intended as a levy. It is vague and indefinite, even when read in the light of the chairman's report, and incomplete in that no tax on privileges is imposed, which is always done. It seems to be more of an expression of the court of what the levy should be, than an actual levy, especially when contrasted with the formal, definite, and complete levy made at the subsequent April term. But if it was intended as a levy, we think it is evident, from the action of the court at the April term, that it was abandoned, probably because considered defective and void, and the one then made, substituted for it. This last levy was made three months after the chairman's report, and contains no reference to it. It was intended to be and is complete in itself. There can be only one levy, and that made in April, was the one intended by the court to be

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effective, and, clearly, the one under which the distress warrant against the plaintiff was issued.

But if the order at the January term was intended as a levy, and in force, and we could consider the evidence offered to show the purpose of the special tax attacked, still we would be compelled to hold it void. The county, or its representatives in quarterly court assembled, had no power to levy a special tax to defray expenses incurred in suppressing an epidemic of smallpox, and repay the loan made to it by the sinking fund commissioners. These are general county purposes intended to be covered by the tax of 30 cents upon the hundred dollars of assessed property authorized by the legislature. It is true that it was within the constitutional power of the general assembly to authorize a special tax for these purposes, but it had not done so. There is a special statute (Code, sec. 503) authorizing the levy of a special tax to pay for repairs made upon the county jail, but it does not appear from the chairman's report what proportion of the sum sought to be raised by the special levy is needed for this purpose. The lawful purpose of the levy is so confused with the unlawful purposes that the valid cannot be separated from the invalid, and the whole is void.

We think, for these reasons, in any view that may be taken of the case, the special levy of 20 cents upon the hundred dollars worth of taxable property is void upon its face and unauthorized by law, and that the distress warrant issued to enforce its collection as against this petitioner should be superseded, and judgment will be entered in accordance with this opinion.

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W. T. RUSSELL *et al.* v. ELZA HOUSTON *et al.*

(*Knorrville*. September Term, 1905.)

JUDGMENTS AND DECREES. *Res adjudicata* shown by production of decree and entries on rule docket, where the papers are lost.

The final decree in an ejectment suit in chancery and the entries on the rule docket are admissible in evidence and may be relied upon to show a former adjudication in a subsequent suit involving the same controversy, without the production of the whole record, where it is shown that the file of papers, including the pleadings, in the case have disappeared from the clerk and master's office, and cannot be found after diligent search. The reason of this rule rests on the presumption in favor of chancery decrees where the court appears to have jurisdiction, and the loss of the pleadings and other unenrolled or unrecorded papers.

Cases cited and approved: *Hopper v. Fisher*, 2 Head, 254; *Pope v. Harrison*, 16 Lea, 82; *Robertson v. Winchester*, 85 Tenn., 171; *Crocker v. Balch*, 104 Tenn., 6; *Galpin v. Page*, 13 Wall., 350; *Coit v. Haven*, 30 Conn., 190; *Sims v. Gay*, 109 Ind., 501; *Tallman v. Ely*, 6 Wis., 244; *Evans v. Young*, 10 Col., 316; *Swearngen v. Gulick*, 67 Ill., 208; *Bradley v. Drone*, 187 Ill., 175; *Gullickson v. Bodkin*, 78 Minn., 33; *Wilkerson v. Schoonmaker*, 77 Tex., 615; *Reynolds v. Stansbury*, 20 Ohio, 344; *Herd v. Cist* (Ky.), 12 S. W., 466; *Sharp v. Brunnings*, 35 Cal., 528, 533.

Cases cited, distinguished, and approved: *Duncan v. Gibbs*, 1 Yer., 261; *Lowry v. McDurmott*, 5 Yer., 225; *Lewis v. Bullard*, 3 Hum., 207; *Whitmore v. Johnson*, 10 Hum., 610; *Carrick v. Armstrong*, 2 Cold., 265; *Willis v. Louderback*, 5 Lea, 561; *Verhine v. Ragsdale*, 96 Tenn., 532; *Givens v. State*, 103 Tenn., 649; *Smith v. Hutchison*, 104 Tenn., 395; *Castleman v. Land Co.*, 1 Tenn. Chy. App., 9.

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FROM COCKE

Appeal from the Chancery Court of Cocke County.—
HAL. H. HAYNES, Chancellor.

PICKLE & TURNER, for complainants.

H. N. CATE and G. A. MOODY, for defendants.

MR. JUSTICE NEIL delivered the opinion of the court.

This was an action of ejectment brought in the chancery court of Cocke county to recover a tract of land described in the pleadings. The right to recover was based upon two grounds, but we need consider only one of them here, viz.; that, when the present suit was brought, the controversy had already been concluded by a decree in a prior litigation between the same parties, or their privies, in the case of *Peck et al. v. Elza Houston et al.*, in the same court.

The chancellor decreed in favor of the complainants, and on appeal this decree was affirmed by the court of chancery appeals. From the latter decree an appeal has been prosecuted to this court, and errors have been assigned here.

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The assignments are very numerous, and all have been examined and disposed of in a memorandum opinion filed with the record. We shall consider only one of them in the present opinion.

The assignment referred to makes the point that the record in the case of *Peck v. Houston* was not admissible in evidence.

Upon this subject the court of chancery appeals report the following facts:

"Complainants also claim under a decree in an action of ejectment against said Elza Houston et al. rendered by the chancery court of Cocke county on the 28th of August, 1889, in favor of complainants or their privies for the land in controversy, and that this decree is binding and effective against the defendants. . . . On November 24, 1885, a bill was filed in the chancery court of Cocke county by I. T. Peck, John H. Peck, and others against the defendants, Elza Houston, Wm. Houston, and others, involving the land now in controversy, and in said case a decree was pronounced reciting that complainants were entitled to the relief sought in their bill, and that their title to the land set forth in grant No. 23,594 from the State of Tennessee to Jacob Peck and Ezekiel Birdseye, dated the 11th day of September, 1840, was the older and superior title to the lands mentioned in the 4,000-acre grant to Howell Houston, which was then, as now, relied on by defendants. A recovery was decreed in favor of complainants for the land, 5,000 acres, the metes and bounds of which are set out in the

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decree, and a writ of possession was awarded to place complainants in possession of the same. It is shown that the file of papers in said case has been out of the office of the clerk and master for a number of years. The attorneys receipted several times for these papers, but they finally disappeared in 1890, and the clerk has looked diligently for them. There is no evidence that they have been in the clerk's office since that time. The rule docket, however, shows the steps taken subsequent to the filing of the bill until the final decree, and the several orders and decrees are preserved on the minutes of the court, all of which appear in full in this record. Again, the defendants admit in their answer and cross bill that the records of the chancery court of Cocke county show that a bill was filed against them or some of them, it being the case of *E. J. Peck et al. v. Elza Houston* and others, and that a final decree appears to have been entered in said cause, and that complainants were adjudged to recover the lands. There is nothing to show that said decree was surreptitiously or fraudulently obtained. . .

"Counsel for defendants . . . insist that it was error to permit the decree to be read in evidence, which objection is made upon the ground that the entire record should be produced."

We infer from the foregoing statements and findings of the court of chancery appeals that all of the record was introduced in the court below that could be found in the office; that is to say, the final decree and the entries on the rule docket. It appears from the findings of

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the court of chancery appeals that the papers constituting the file in the cause finally disappeared from the clerk and master's office in the year 1890, and that they cannot be found in that office, although they have been diligently searched for.

The question is on whom does the burden lie, under such a state of facts, to supply the missing parts of the record; or, to state it differently, can either party, neither being in fault, in respect to the absence of the missing parts of the record, rely upon the decree as *prima facie* evidence of the rights purporting to be adjudged and secured therein?

We are of the opinion that under the circumstances stated either party might rely upon the decree without going to the expense and delay required to supply such missing parts of the record by a bill filed for that purpose or by affidavits in the cause. The reason is that the court of chancery is a court of general jurisdiction, and every reasonable presumption must be indulged in support of its decrees. Where it appears from the face of the decree that the chancery court had jurisdiction of the subject-matter, this court, in the absence of evidence to the contrary, will presume that it had jurisdiction of the persons whose rights were involved, and also that proper pleadings were filed and issues duly made to justify the passing of such a decree. Before this rule can be applied, of course, the missing parts of the record must be accounted for; that is, it must be shown that they are not accessible. This rule is essential to the pro-

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tection of titles and rights resting upon decrees of courts of chancery, since the law does not require the enrollment of the pleadings, and being loose papers they are easily misplaced and lost. The principles on which this rule rests will be found in the cases of *Hopper v. Fisher*, 2 Head, 254; *Pope v. Harrison*, 16 Lea, 82; *Robertson v. Winchester*, 85 Tenn., 171, 1 S. W., 781; *Crocker v. Balch*, 104 Tenn., 6, 55 S. W., 307; *Galpin v. Page*, 13 Wall., 350, 21 L. Ed., 959; *Coit v. Haven*, 30 Conn., 190, 79 Am. Dec., 244; *Sims v. Gay*, 109 Ind., 501, 9 N. E., 120; *Tallman v. Ely*, 6 Wis., 244; *Evans v. Young*, 10 Colo., 316, 15 Pac., 424, 3 Am. St. Rep., 583; *Swearengen v. Gulick*, 67 Ill., 208; *Bradley v. Drone*, 187 Ill., 175, 58 N. E., 304, 79 Am. St. Rep., 214; *Gulickson v. Bodkin*, 78 Minn., 33, 80 N. W., 783, 79 Am. St. Rep., 352; *Wilkerson v. Schoonmaker*, 77 Tex., 615, 14 S. W., 223, 19 Am. St. Rep., 803; *Reynolds v. Stanbury*, 20 Ohio, 344, 55 Am. Dec., 459; *Herd v. Cist* (Ky.), 12 S. W., 466; *Sharp v. Brunnings*, 35 Cal., 528, 533.

The rule is general, of course, that the whole record must be produced when it is in existence. *Smith v. Hutchison*, 104 Tenn., 395, 58 S. W., 226; *Castleman v. Land Co.*, 1 Tenn. Ch. App., 9; *Willis v. Louderback*, 5 Lea, 561; *Carrick v. Armstrong*, 2 Cold., 265; *Lewis v. Bullard*, 3 Humph., 207; *Duncan v. Gibbs*, 1 Yerg., 261; *Givens v. State*, 103 Tenn., 649, 55 S. W., 1107. These cases, however, do not conflict with the rule above announced, since it is a predicate of that rule that all of the record must be produced that is in existence.

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Nor are the cases of *Lowry v. McDurmott*, 5 Yerg., 225; *Whitmore v. Johnson's Heirs*, 10 Humph., 610, and *Verhine v. Ragsdale*, 96 Tenn., 532, 35 S. W., 556, opposed to the rule which we have announced. These cases stand upon a different basis, and in considering them the court had no occasion to examine or pass upon the special phase of the question to which we have herein directed our attention.

This decree being admissible, it settles the controversy. It appears from the findings of the court of chancery appeals that the heirs of Peck were the complainants in that case and the present defendants were defendants therein, and the present complainants claim under the said heirs of Peck.

Of course, the defendants might have acquired after that litigation a new title superior to that claimed by complainants therein, but no such new title is asserted in the present controversy. That decree must be regarded as having closed all matters of litigation in respect of the title of the land in existence prior to its institution.

It results that the decree of the court of chancery appeals must be affirmed.

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LUKE SMITH, by next friend, v. DAYTON COAL & IRON
COMPANY, Limited.

(*Knoxville*. September Term, 1905.)

1. **STATUTES.** Adopted from other States carry with them the judicial construction thereof, when and when not.

As a general rule, when a statute of another State is adopted, the judicial construction and interpretation of that statute in the State of its origin is also imported and written in the statute by the adopting State; but this general rule is subject to the important qualification that the judicial construction of said statute by the State of its origin does not contravene the well established policy prevailing on said subject in the adopting State. (*Post*, pp. 552, 553.)

Cases cited and approved: Jamison v. Burton, 43 Iowa, 285; Cole v. People, 84 Ill., 218; McCutcheon v. People, 69 Ill., 601.

2. **MASTER AND SERVANT.** Master's obligation to furnish safe working places in mines cannot be delegated so as to escape liability.

A master engaged in mining is bound to use reasonable care to make the place of work reasonably safe, and he must use reasonable care to ventilate the mine in order to prevent the accumulation of poisonous and explosive gases, and he must shore up and timber the shafts and galleries, and take such other precautions as may be reasonably necessary to prevent the fall of rock, earth, etc., and these duties cannot be delegated, so as to exonerate him from liability for a breach thereof. (*Post*, pp. 553-559.)

Acts cited and construed: 1881, ch. 170, sec. 8.

Cases cited and approved: Taylor v. Railroad, 93 Tenn., 305; Iron Co. v. Pace, 101 Tenn., 484; Railroad v. Jarvi, 3 C. C. A., 433; Gowen v. Bush, 22 C. C. A., 196; Coal Co. v. Persons, 11 Ind. App., 264.

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Cases cited and distinguished; *Heald v. Wallace*, 109 Tenn., 346; *Finlayson v. Mining Co.*, 14 C. C. A., 492.

Case cited and disapproved: *Railroad v. Hughes*, 119 Pa., 314.

8. **SAME. SAME. Same. Same.** Employment of competent mining boss does not exonerate mining operator from liability for the negligence of such boss.

Our statute (Acts 1881, ch. 170, sec. 8), requiring the operator of a coal mine to employ a competent and practical inside overseer or mining boss to protect the miners working therein, must be construed to impose upon such operator the duties imposed at common law on the employer to provide a safe place to work, which duty cannot be delegated; and such operator who employs a competent mining boss is nevertheless chargeable with his negligence, resulting in injury to a miner; although such statute is adopted from the State of Pennsylvania after the courts of that State had construed the act to exempt such operator from the negligence of the mining boss, if he was competent to perform the duties, since such construction is contrary to the policy of our laws.

Acts cited and construed: 1881, ch. 170, sec. 8. But see Acts 1901, ch. 37.

Cases cited and disapproved: *Coal Co. v. Jones*, 86 Pa., 441; *Canal Co. v. Carroll*, 89 Pa., 374; *Reese v. Biddle*, 112 Pa., 79, 80; *Waddell v. Simoson*, 112 Pa., 573, 574; *Railroad v. Hughes*, 119 Pa., 314; *Haley v. Keim*, 151 Pa., 117; *Lineoski v. Coal Co.*, 157 Pa., 153; *Williams v. Coal & Coke Co.*, 44 W. Va., 599; *Coal Co. v. Lamb*, 6 Colo. App., 255.

FROM RHEA.

Appeal from the Circuit Court of Rhea County.—JOSEPH H. HIGGINS, Judge.

Smith v. Coal & Iron Co.

A. P. HAGGARD and SAM H. FORD, for plaintiff.

BURKETT, MILLER & MANSFIELD, for defendant.

MR. JUSTICE M'ALISTER delivered the opinion of the Court.

Luke Smith, a minor, brought this suit by his next friend against the Dayton Coal & Iron Company to recover damages for personal injuries sustained while working in defendant's mines.

The declaration embraces three counts, and complains (1) of the negligence of the mine boss in failing to properly inspect the mine; (2) for breach of duty on the part of defendant in failing to furnish plaintiff a safe place to work; (3) the failure of defendant to warn plaintiff of the danger.

A demurrer was interposed to the first and second counts of the declaration, assigning for cause that defendant was not liable for any breach of duty on the part of its mine boss; it not being averred that it had failed to exercise due care and caution in employing him.

The circuit court, Hon. M. D. Smallman presiding, sustained this ground of demurrer, holding that, if defendant company employed a careful and competent inside overseer or mine boss, as required by section 8, c. 170, p. 238, Acts 1881, and that by reason of the negligence, inattention, or carelessness of such boss the

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plaintiff was injured, he could not recover on account of such injury.

The third count of the declaration alleged a breach of duty on the part of the defendant in failing to employ a certified mine foreman, as required by chapter 37, p. 51, Acts 1901.

The demurrer to this count of the declaration assigned as cause that the act in question did not take effect until after the accident, and hence compliance with said act was not required.

This ground of demurrer was also sustained by the circuit judge.

A plea of not guilty was also interposed to the three counts of the declaration. There was a trial on this plea, wherein the plaintiff and defendant each presented their evidence as though there had been no judgment on the demurrer. At the conclusion of the evidence the trial judge instructed the jury as follows:

"A demurrer to the declaration was interposed by the defendant and acted on by my predecessor, and I am of the opinion that it reaches all the facts in the evidence, if any, there be, which would warrant a recovery, and, being bound by the action of my predecessor on the demurrer, I am of the opinion there are no questions of fact to submit to the jury, and it will be your duty to find a verdict in behalf of the defendant."

This was accordingly done, whereupon plaintiff appealed and has assigned errors.

An examination of the record reveals that the only ac-

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tionable negligence claimed on the trial was the failure of the mine boss to perform the duties required of him by the statute, and hence the only question presented for our determination is whether the trial judge was correct in his ruling that, as between the coal company and the mine boss, the principle of *respondeat superior* would not apply for injuries sustained by an employee in consequence of the negligence of the mine boss. This was the question presented by the demurrer and which was resolved in favor of the contention of the defendant company. The proper solution of this question depends upon a proper construction of chapter 170, p. 234, Acts 1881, entitled: "An act to provide for the ventilation of coal mines and collieries for the protection of human life."

Section 8, p. 238, of that act provides as follows:

"That to better secure the ventilation of every coal mine and colliery and to provide for the life and safety of the men employed therein, otherwise and in every respect, the owner or agent, as the case may be, in charge of every coal mine and colliery, shall employ a competent and practical inside overseer to be called 'mining boss,' who shall keep a careful watch over the ventilating apparatus, over the airways, traveling ways, pumps, and sumps, and the timbering, and see, as the miners advance in their excavations that all loose coal, slate or rock overhead is carefully secured against falling; . . . and all things connected with and pertaining to the safety of the men at work in the mines."

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It should be remarked that no complaint is made that the company breached its duty in employing an unskilled and incompetent mine boss. The contention on behalf of plaintiff is that the circuit judge was in error in holding that the defendant company, having in the first instance employed a competent mining boss, was not afterwards liable for any negligence or breach of duty on the part of said boss. The action of the circuit judge seems to have been based on the construction of our mining statute, which is a transcript of the Pennsylvania act, and which had been construed by the Pennsylvania courts prior to its adoption in this State in 1881.

As already seen, the duties of the inside mining boss are specifically defined by the act of 1881, and the company is required to employ him in obedience to the mandates of the statute. The question presented is whether, in the performance of his statutory duties, the mining boss acts as vice principal, or whether he is a mere fellow servant, as already stated. It is argued that our act of 1881 is a literal copy of chapter 1, Acts Pa., 1870 (P. L. 3), and that at the time our statute was enacted the Pennsylvania statute had undergone a uniform construction by the supreme court of that State. It was held by the Pennsylvania court that the duties imposed by section 8 were duties of the mine boss, whom the operator was by law compelled to employ, and, if the mine boss failed to discharge his duties, he was personally liable in damages and also to criminal prosecution. It is admitted that under the first section the company

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would be liable in damages for a breach of its statutory duty in failing to employ a competent and practical mining boss; but it is insisted that the company, having discharged its duty and employed a competent and practical mining boss, it is not liable in damages for his failure to perform the duties which the statute has enjoined upon him.

In the case of *Lehigh Valley Coal Co. v. Jones*, 86 Pa., 441, it was said:

“Nor do we think liability of the company for the act of its mining boss is changed, where he is appointed pursuant to statute, by the fact that he has a superintendent over him who has the power to direct and control him. We discover no sound reason for any distinction. In either case the company must appoint a competent and suitable person and provide safe machinery. He [the boss] is to carefully watch and to see for the purpose of protecting from danger all the men at work in the mine, says the statute.”

The act was again construed by the supreme court of Pennsylvania in 1879, in the case of *Del. & Hud. Canal Co. v. Carroll*, 89 Pa., 374. In that case it was said as follows:

“It is too plain for argument that, if the defendants have not violated said act, they are not responsible. In what respect have they transgressed its provisions? They employed a mining boss as required by the act, and there is no allegation that he was not competent and a practical man. No attempt was made to show that defend-

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ants were guilty of negligence in not employing a mining boss, that they employed an incompetent man, or that they employed him without knowledge of his capacity or fitness and without making inquiry as to his qualifications, as a man of ordinary prudence would do. The defendants, having placed such mining boss in charge of the work, are not in default. The negligence of the boss, if it exists, might make him liable to the plaintiffs. It certainly cannot render this defendant liable under this act of the assembly."

In *Waddell v. Simoson*, 112 Pa., 573, 574, 4 Atl., 725, 726, it is said:

"Moreover, as the defendants had complied strictly with the eighth section of the act of March 3, 1870, in providing a skillful and practical overseer or mining boss, and, as they had thus fulfilled the duty imposed upon them by the general assembly, it is not for this or any other court to charge them with an additional obligation. It is too plain for argument that, if defendants have not violated said act, they are not responsible."

In *Reese v. Biddle*, 112 Pa., 79, 80, 3 Atl., 813, 814, it is said:

"It was plain error to instruct the jury that defendants below are responsible for the negligence of their mine boss. There was no evidence that he was not competent to perform his duties and hence no negligence can be imputed to defendants for employing him."

See, also, *Haley v. Keim, Rec.*, 151 Pa., 117, 25 Atl.,

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98; *Lineoski v. Susquehanna Coal Co.*, 157 Pa., 153, 27 Atl., 577.

The supreme court of West Virginia in *Williams v. Thacker Coal & Coke Co.*, 44 W. Va., 599, 30 S. E., 107, 40 L. R. A., 812, in construing a similar provision in a statute of that State, which was a copy of the Pennsylvania statute, used this language:

"The operator is left no choice, no discretion in the matter. Although he may himself be a practical miner, possessed of all the qualifications of a mine boss, yet under the statute he is compelled to employ such person. The legislature so far interferes with the private business of the capitalist as to require him to take into his employment a person whose experience in business and sound judgment equip him for such management and the oversight of the conduct of the mines as to reduce the danger thereof to a minimum. The duty of the operator or agent is to employ a competent mine boss according to the provisions of the statute, and when he has done so he has discharged his duty to his employees in relation to those duties which the statute prescribes shall be performed by such mine boss, and the operator or agent is not liable for injuries arising from the negligence of the mine boss, who is not a vice principal, as his duties are not delegated to him by his employer, but are prescribed by the statute; but he is a fellow servant, and, in case of injury to other employees through his negligence, the master is not responsible."

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It may be stated as a general rule that, when a statute of another State is adopted, the judicial construction and interpretation of that statute in the State of its origin is also imported and written in the statute by the adopting State. This rule, however, is subject to the important qualification that the judicial construction of said statute by the State of its origin does not contravene the well-established policy prevailing on said subject in the adopting State. As said by Endlich on Interpretation of Statutes, p. 518:

“But as applied to transcribed statutes, this rule is undoubtedly subject to important qualifications. Whilst admitting that the construction put upon such statutes by the courts of the State from which they are borrowed is entitled to respectful consideration, and that only strong reasons will warrant a departure from it, its binding effect has been wholly denied, and it has been asserted that a statute of the kind in question stands upon the same footing, and is subject to the same rules of interpretation as any other legislative enactment. And it is manifest that the imported construction should prevail in so far as it is in harmony with the spirit and policy of the legislation of the home State, and should not, if the language of the act is fairly susceptible of another interpretation, be permitted to antagonize other laws in the face of the latter or to conflict with its settled practice.”

In *Jamison v. Burton*, 43 Iowa, 285, it was said:

“The limitation that the construction by another State

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of a statute of that State enacted here will be valid only when consistent with the spirit and policy of our laws, is eminently proper. For otherwise we could not avail ourselves of the legislative wisdom of other States without introducing along with it incongruous and in-harmonious judicial construction."

In *Cole v. People*, 84 Ill., 218, it was said:

"It can hardly be said that the legislature, in adopting the statute of another State, intended also to adopt a construction in direct antagonism with our laws and in conflict with a practice that has prevailed under them for a long series of years. At most it is but a presumption and may be repelled when such construction is found to be inconsistent with the spirit and policy of our laws." *McCutcheon v. People*, 69 Ill., 601.

We think these authorities announce the true rule, and we proceed to inquire whether the imported construction of the transcribed statute contravenes the spirit and policy of our laws. At common law a master who is engaged in the business of mining is bound to use reasonable care to make the place of work reasonably safe. He must therefore use reasonable care to ventilate the mine in order to prevent the accumulation of poisonous and explosive gases. He must also shore up and timber the shafts and galleries and take such other precautions as may be reasonably necessary to prevent the fall of rock, earth, etc. Amer. & Eng. Ency. Law, vol. 20, p. 58; *Union Pacific Railway v. Jarvi*, 53

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Fed., 65, 3 C. C. A., 433; *Gowen v. Bush*, 76 Fed., 349, 22 C. C. A., 196.

It is assumed by counsel that this court in *Heald v. Wallace*, 109 Tenn., 346, 71 S. W., 80, decided that the doctrine of a safe place to work did not apply to mining operations. In that case it appeared that at the time of the accident deceased was engaged in driving the neck of a room, and under the rules and custom of the company, it was the duty of the miner to make the necessary tests of his room neck and if he discovered it was not safe, he was charged with the duty of sending for the timberman, etc. It was said in that case that, according to the testimony of plaintiff's witnesses, the duty of inspecting the changing top of a room neck is the same as in any other part of the room. This court held that the doctrine of a safe place to work does not apply to such places as are constantly shifting and being transformed as the direct result of the employees' labor. When he engaged in a work of making a place that is known to be dangerous safe, or in work that necessarily changes the character for safety of the place in which it is performed as the work progresses, the hazard of the dangerous place, and the increased hazard of the place made dangerous by the work, are the ordinary and known dangers. Citing *Finlayson v. Mining Co.*, 14 C. C. A., 492, 67 Fed., 510.

But we did not hold that the company was under no obligation to make its permanent places of work reasonably safe for its employees. We had already held in

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Iron Co. v. Pace, 101 Tenn., 484, 48 S. W., 232, that it is the duty of the master to keep his premises used in the prosecution of his business in a reasonably safe condition, and if he fails to do so he is liable to the servant for all injuries resulting to him from such defects, and that this rule applied to a mining corporation. It was also held in that case that the company was liable for failure of the mine boss to examine every morning the mines not only for noxious and explosive gases, but for mine dust or other explosive substances that may endanger the life or health of the miners and remove every such thing, etc., as required by section 8 of the act of 1881. But in that case one of the counts of the declaration proceeded upon the idea that the company had been negligent in the employment of the mining boss and that the latter was incompetent to perform his duties, and there was proof tending to establish this allegation.

It must be admitted in view of the authorities that the duties devolved by the statute on the mining boss were not different from those that the company was obliged to perform at common law, and which the company would not have been authorized to delegate and thereby escape liability for the nonperformance of those duties. What, then, is the effect of the statute requiring the company to employ an inside overseer or mine boss and devolving upon him the duties which, at common law, belong to the company? As already seen, the Pennsylvania and West Virginia courts, in construing this statute, have held that the effect thereof was to shift

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the responsibility for the negligent performance of these duties upon the mining boss, since the company was compelled to employ him and his duties were specifically defined by the statute.

To the same effect is *Colo. Coal Co. v. Lamb*, 6 Colo. App., 255, 40 Pac., 251.

Mr. Thompson, in his work on Negligence (volume 4, cl. 4206), in combating the doctrine of the Pennsylvania and West Virginia courts, used the following language:

"The employment of a mine boss or mine foreman: When it is recalled that the duty of exercising care, to the end that the mines shall be a reasonably safe place within which his employees are to work, is an absolute and unassignable duty, it quite readily follows that the owner of a mine does not, by employing a so-called 'mining boss,' or 'mine boss,' or 'mine foreman,' who is competent and fit for his duties, release himself from the obligation of taking those precautions which are necessary for the reasonable safety of his miners, nor from the necessity of taking the precautions prescribed by the statute law, although the statute law requires him to employ a mine boss. The effect of such a statute is to prescribe the duties owing by the master, and the fact that the mine boss is required to be employed to perform those duties does not release the master from the obligation of performing them or of seeing that they are performed. . . . Contrary to the above, we find an untenable and regrettable decision to the effect that a mine owner discharges his full duty to his miners when he

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complies with the statute requiring him to employ a properly qualified person to discharge the duties required therein as to the care and inspection of the mine, and is not liable for accidents traceable to the carelessness or negligence of such person, who is a fellow servant with the other miners. Reasoning on similar lines, another court holds that the employment of a competent mine boss, as required by the statute, discharges the full duty prescribed by the statute, and that the employer is not liable for the negligence of the mine boss in the performance of those duties which the statute prescribes shall be performed by him. He is not a vice principal, and his duties are not delegated to him by his employer, but are prescribed by the statute."

On the latter proposition Mr. Thompson cites Pennsylvania and West Virginia cases. The only authority cited by him for his text in opposition to the rulings in Pennsylvania and West Virginia is the case of *Linton Coal Co. v. Persons*, 11 Ind. App., 264, 39 N. E., 214.

In that case the court held that the duties prescribed relating to the safety of the mine are the positive duties of the master and that the statute was intended, not to lessen his duties, but to increase them to the extent of requiring him to employ a competent mining boss to give special attention to the condition of the mine.

In *Gowen v. Bush*, 76 Fed., 349, 22 C. C. A., 196, it was held that an employee, who was charged with the duty of inspecting the mine to see that it was free from gas, was not, while thus engaged, a fellow servant of the

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miners; and this for the obvious reason that the inspector was in the performance of a duty that devolved upon the principal and the inspector was *pro hac vice* a vice principal.

In this State the doctrine has always prevailed that it is the duty of the master to provide a reasonably safe permanent place of work for his employees, and that this duty cannot be delegated, so as to exonerate the master from liability for a breach of his duty. In Pennsylvania it appears that a different rule has prevailed. In *Railroad v. Hughes*, 119 Pa., 314, 13 Atl., 289, it was said:

"If, however, the company employed competent and skillful persons for the purpose of inspection, and afforded them reasonable opportunities and facilities for the work under proper instruction, the company will not ordinarily be liable for the negligent performance of the work of their employees, to a fellow employee, unless the company knew, or by the exercise of diligence ought to have known, of the defective manner in which the work was being done. The court then held that a brakeman and a car inspector were fellow servants, the same business and that the former assumed the risk of the negligence of the latter in common service."

In this State, however, it is uniformly held that a brakeman and a car inspector are not fellow servants, but in different and distinct departments of the company's service (*Taylor v. Railroad*, 93 Tenn., 305, 27 S. W., 663), and that the company is liable for the negli-

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gence of the former whereby an injury is sustained by the latter. So that it is obvious that the rule with reference to a safe place to work and the fellow-servant doctrine is entirely different in this State from that which prevails in the State of Pennsylvania; hence the adjudications of that court, exempting a mining company from liability for the negligence of a mine boss employed in obedience to the mandates of the statute, which specifically defined his duties, were in entire accord with the general policy and legal system of that State regulating the relations of master and servant. We are of opinion, however, that the decisions of that State and of the other States which exempt mining corporations from liability for the negligent acts of the mining boss are not in consonance with our general system defining the duties of master and servant.

The act of 1881 is entitled "An act to provide for the ventilation of coal mines and collieries for the protection of human life." But, under the construction of the act contended for, the company is relieved of all positive duty and responsibility in providing safeguards for the protection of human life, when it has appointed a competent and practical inside overseer or mining boss. Surely such a construction could never have been contemplated by the legislature, in view of the express object and purpose of the statute.

We are therefore of opinion that the judgment of the circuit court sustaining the demurrer was erroneous, and must be reversed, and the cause remanded for a new trial.

Hearst v. Proffit.

HEARST *et al.* v. PROFFIT.

(Knoxville. September Term, 1905.)

1. **APPEAL IN EQUITY CASE.** Vacates decree, and opens whole case.

An appeal in an equity cause vacates the decree of the lower court, and the case is opened for a re-examination in the appellate court on all questions legitimately arising upon the record.

Case cited and distinguished: Denton v. Woods, 86 Tenn., 40.

2. **SAME.** Same. Affirmance not rested on recitals in decree.

The supreme court will not predicate an affirmance of a decree in an equity cause merely upon recitals in the decree where the record contains no evidence to sustain such recitals.

Cases cited and approved: Nichols v. Cecil, 106 Tenn., 455; Mullins v. Aiken, 2 Helsk., 548.

3. **SUPREME COURT.** Will remand for proof and rehearing, when. Case in judgment.

Where a suit brought by bill in chancery to foreclose a trust deed made by defendant is about to be defeated because of the inadvertence of counsel in not filing a certified copy of the deed of trust, and it appears from recitals in the decree that the deed of trust was read from the register's book by consent, and complainant's counsel was not required at the time to produce a certified copy thereof, the supreme court will remand the case to the chancery court for a rehearing, with leave to both parties to introduce such testimony as they may desire.

FROM CLAIBORNE

Appeal from Chancery Court of Claiborne County.—
HUGH G. KYLE, Chancellor.

Hearst v. Proffit.

JOHN P. DAVIS, for Proffit.

FRANK WHITE and H. Y. HUGHES, for Hearst *et al.*

MR. JUSTICE MCALISTER delivered the opinion of the Court.

There is no bill in this record, but we infer from the averments of the answer and from the recitals of the decree that the object of the bill was to foreclose a trust deed made by defendant to secure the payment of certain counsel fees. There is no proof embodied in the record, not even the trust deed itself. At the April term, 1904, the chancellor pronounced a decree in favor of J. H. Hearst, executor, for \$369, in favor of W. G. Colson for \$369, and in favor of R. G. McKee for \$392.50, against defendant, James Proffit, and the decree further recited that defendant had executed a deed of trust on a tract of land therein described to secure the payment of said amounts. It was decreed that, unless said sums were paid within sixty days, defendant's land therein described should be sold to satisfy said decree. Said land was accordingly sold on the 11th of October, 1904, and the report of sale was confirmed at the April term, 1905. The defendant appealed and assigned the following errors:

(1) The court erred in finding as a fact that defendant is indebted to Hearst as executor of the estate of E. Hearst, deceased, in the sum of \$369, or in any other

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sum, for the reason there is no evidence whatever in the record to support this finding.

(2) The court erred in finding as a fact that defendant is indebted to W. G. Colson in the sum of \$369, and to R. G. McKee in the sum of \$392.50, for the reason there is no evidence to support the findings.

(4) The court erred in finding as a fact that defendant executed a mortgage or trust deed upon the tract of land set out in the decree to secure said indebtedness, for the reason there is no evidence in the record to support this finding.

The decree of the chancellor contains the following recital:

"This cause came on to be heard before Hon. Hugh G. Kyle, chancellor, on the 10th day of April, 1904, upon the bill and answer, the plea filed for defendant, a deed of trust or mortgage read by consent from Trust Book T, vol. 2, of the register's office of Claiborne county, Tennessee, from all of which the court finds, adjudges, and decrees, etc."

The record reveals that when the report of sale was sought to be confirmed at the April term, 1905, counsel objected to the confirmation of the report, upon the ground that he had only recently been employed as counsel, and had not had access to the files of papers in the case. An examination of the files showed that the original bill had been lost or mislaid. The chancellor ordered that complainant supply the original bill, and probably supposing that would be done, he confirmed the

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report of sale, since there were no other exceptions interposed thereto. Counsel for defendant, the present appellant, took a bill of exceptions to the action of the court, confirming the report of sale, and embodied therein the proof of the loss of the original bill and the examination of witnesses seeking to fix the responsibility for its loss. The chancellor held on this examination that defendant, Proffit, was not responsible for the loss of the original bill. In its present shape, besides the bill of exceptions just mentioned, the record only embodies the answer of the defendant, the decree of the chancellor, the report of sale and confirmation thereof, and certain minute entries showing a continuance of the case probably for two years.

The fundamental proposition advanced on behalf of the appellant is that the appeal vacated the decree of the chancellor, and that the cause is now before this court for re-examination *de novo*, and that, since the record contains no bill presenting the issues of fact, and no proof whatever as to the amount of defendant's indebtedness to the complainant, and no copy of the deed of trust executed to secure that indebtedness, that the whole case now rests upon the decree of the chancellor, and since there is no evidence to support it, it must be reversed, and complainant's bill dismissed.

On the other hand, it is the contention of the complainant that the presence of the original bill in the present record is wholly unnecessary, since the answer of the defendant, which is copied therein, expressly admits

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his indebtedness to the complainant and the execution of a deed of trust to secure the same.

But it is averred in the answer by way of avoidance that the counsel whose retainer fees were secured by the deed of trust had failed to perform the professional service for which they had been employed, and in consequence thereof defendant had been constrained to employ other counsel to perform those services, and for this reason he insisted there had been a failure of consideration for which the notes and deed of trust had been executed. It should have been stated that the answer also embodied a plea of the statute of limitations of seven and ten years to the enforcement of the deed of trust.

The court of chancery appeals very properly held that the burden of proof rested on the defendant to establish by proof his plea of the statute of limitations; and, further, that the failure of consideration averred in the answer, being a matter in confession and avoidance, the burden of proving that fact also devolved upon defendant.

It further held the defendant had adduced no evidence to establish either of these defenses; but that court was of opinion that since the answer admitted the execution of the deed of trust and the indebtedness, and since the decree recited that the deed of trust had been read by consent of counsel, the admissions of the answer and the recital of the decree were sufficient to support it.

That court proceeded upon the idea that the case "hav-

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ing been decided by the lower court against the defendant, the presumption of law is that it was decided correctly. It is true that in an equity case pending before the appellate court in Tennessee, the trial is largely *de novo*, but it is equally the law that the laboring oar is always upon the party appealing. If the appealing party fails to assign error, and point out specifically wherein the judgment against him is wrong, the decree of the chancellor will always be affirmed."

That court cites *Denton v. Woods*, 86 Tenn., 40, 5 S. W., 489, wherein it is said:

"The presumption is in favor of the correctness of the ruling and decisions of lower courts, and, under established practice in this court, unless error is affirmatively shown, an affirmance will be had."

We do not think the rule announced in that case applies here, since the appellant has by assignments of error specifically pointed out the errors in the record. The real question presented for our decision is whether an equity decree, in the absence of the original bill, and any proof whatever in support of the decree, can be affirmed upon the admissions in the answer, and the mere recitals in the decree. As already seen, the answer admitted the execution of a deed of trust, and an indebtedness to the complainant, but the amount of that indebtedness was not admitted, nor was the land covered by the deed of trust in any way described or identified in the answer. It is true the record recites that by consent the deed of trust was read from the original books of entry in the

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register's office of Clairborne county, but no copy of the deed of trust was thereafter filed or embodied in the record. We cannot predicate an affirmance of this decree merely upon its recital, since the appeal has vacated the decree and opened the cause for a re-examination on all questions legitimately arising.

In *Nichols v. Cecil*, 106 Tenn., 455, 61 S. W., 768, the question presented was whether a certain contract had been established by the proof in the court below. None of the evidence heard by the chancellor was preserved by the bill of exceptions. "We hold this court cannot presume there was sufficient evidence before the chancellor to warrant him in finding the contract, for the reason the record contains no evidence establishing the contract."

In the case of *Mullins v. Aiken*, 2 Heisk., 548, it appeared that on the hearing of the cause before the chancellor certain deeds were read from the register's book. These deeds not being filed in the case, were of course not made a part of the record, and were not sent up to this court as a part of the transcript. The parties relying upon said deeds thereafter sought to have them made a part of the record. This court said:

"The parties having failed to file their papers and thereby make them a part of the record, must abide the result."

We are therefore of opinion that the court of chancery appeals was in error in affirming the decree of the chancellor, but since it appears from the decree that the deed of trust was read from the register's book by con-

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sent and complainant's counsel was not required at the time to produce a certified copy; and since the case appears to be a meritorious one, and is about to be defeated through inadvertence of counsel in not filing a certified copy of the deed of trust, the court is of opinion this is a proper case to be remanded to the chancery court for a rehearing, with leave to both parties to introduce such testimony as they may desire. Complainant will pay the entire costs of the case.

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BENNETT v. GALLAHER et al.

(*Knoxville*. September Term, 1905.)

1. WILLS. Equitable conversion of realty into personalty, how effected.

It is well settled that, in order to work an equitable conversion of realty into personalty, the intention of the testator to make such conversion must be clear and certain, and the direction to sell the land for that purpose must be imperative and unconditional.

Cases cited and approved: *Bedford v. Bedford*, 110 Tenn., 204; *McElroy v. McElroy*, 110 Tenn., 137; *Wayne v. Fouts*, 108 Tenn., 145; *Wheless v. Wheless*, 92 Tenn., 295; *Green v. Davidson*, 4 Baxt., 491.

2. SAME. Equitable conversion, not effected, when.

If, by the terms of a will, the direction to sell realty is made to depend upon contingencies or discretion is conferred upon the executor or trustee to sell for distribution or divide the property in kind, the intent of the testator to make conversion is not evident and positive, and none is effected.

Cases cited and approved: See first headnote.

3. SAME. Same. Case in judgment.

By his will the testator devised his property, real and personal, to his widow during her life, for the joint use of herself and their children, and empowered her to dispose of the personalty at her discretion, and upon the marriage of any child, to give to such child whatever property she might desire, preserving equality among the children, and authorized her to sell any real estate as she might think best, and provided that at her death any remaining property should be sold and divided equally among the children. During the lifetime of the widow, one of the daughters died, and her husband as administrator

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filed this bill, after the death of the widow, to recover as personalty the share of his wife upon the ground that the will worked an equitable conversion of realty into personalty.

Held: The provision authorizing the widow to give to her children upon their marriage, "whatever property she might desire," empowered her to divide in kind the entire estate among the children, at her discretion, and therefore the doctrine of equitable conversion does not apply.

FROM ANDERSON.

Appeal from the Chancery Court of Anderson County.
—HUGH G. KYLE, Chancellor.

WEBB, M'CLUNG & BAKER, for Bennett.

C. J. SAWYER and YOUNG & YOUNG, for Gallaher *et al.*

MR. JUSTICE MCALISTER delivered the opinion of the Court.

Plaintiff files this bill, asserting a claim to the proceeds of sale of certain real estate under the will of R. G. W. Owens, upon the doctrine of equitable conversion. A demurrer was interposed to the bill, which was sustained by the chancellor, and the bill dismissed. Complainant appealed, and assigned as error the action of the chancellor in sustaining the demurrer.

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The said R. G. W. Owens departed this life in Anderson county, Tennessee, in 1860, leaving valuable real and personal estate situated in Anderson county. The testator left surviving him his widow, Catherine Owens, and seven children, Martha Elizabeth, Mary Sibella, Sarah Ann, Amanda Jane, Josephine Bonaparte, Margaret M. D., and William Lones. Josephine Bonaparte, one of the daughters of the testator, intermarried with the complainant, James Bennett, in the year 1870, and died in the year 1885, leaving surviving her the complainant, her said husband, and four children. .

The controversy in the case arises upon a proper construction of the will of the said Owens, which is in the words and figures following, to wit:

"It is my wish and desire, and I furthermore give and bequeath unto my beloved wife, Catherine, all of my personal property whatsoever, and all of my real estate that I may die seized and possessed of, to have and hold for her use, and the use and benefit of my children, Martha Elizabeth, Mary Sibella, Sarah Ann, Amanda Jane, Josephine Bonaparte, Margaret M. D., and William Lones, during her natural life; and I furthermore empower my said wife, Catherine, to sell and dispose of whatsoever personal property she may think best, and when each or any of my said children may marry, my wife, Catherine, may give to each one whatever property she may desire, so as to be equal among them; and I furthermore empower my wife, Catherine, to sell any real estate that she may think best, with the advice and

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counsel of her friends, and at her death I wish whatever property there may be to be sold and equally divided among my above-named children. Lastly, I hereby nominate, constitute, and appoint my beloved wife, Catherine, executrix of my last will and testament."

The widow duly qualified as executrix, and used the property until November 11, 1904, when she died, without having disposed of any of the real estate.

It appears from the bill that after the death of the said Josephine Bonaparte, and during the life of the said Catherine Owens, the widow, the children of complainant and his wife, said Josephine Bonaparte, believing that the interest of their mother under the will of her father in the lands described had descended to them as realty, sold and conveyed the same for certain considerations, but without the knowledge or consent of the present complainant, their father. It is further alleged that complainant was appointed administrator of his wife's estate, and on February 14, 1905, commenced this suit for the purpose of collecting the interests of his deceased wife, which descended to her under the will of her father. The bill and the amended bill proceed upon the idea that under the provisions of the will of R. G. W. Owens the real estate therein devised, under the doctrine of equitable conversion, immediately upon the death of the testator, became personal property, and that his wife, the said Josephine Bonaparte, took an interest in the proceeds of the real estate as personal property, and that upon her death her interests in said personalty

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passed to him as her husband and administrator. There were various assignments in the demurrer, but the cardinal question raised is whether, under the terms of said will, the real estate therein conveyed was converted into personalty upon the death of the testator.

The contention on behalf of the children of the said Josephine is that their interests in the estate of their grandfather descended to them as real estate, and that their father took no interest therein.

Mr. Pomeroy, in his work on Equity Jurisprudence (volume 3, par. 1162), says:

“Time from which conversion takes place. This, like all other questions of intention, must ultimately depend upon the provisions of the particular instrument. The instrument might in express terms contain an absolute direction to sell or to purchase at a specified future time; and if it created a trust to sell upon the happening of a specified event, which might or might not happen, then the conversion would only take place from the time of the happening of that event, but would take place when the event happened, exactly as though there had been an absolute direction to sell at that time. Subject to this general modification, the rule is well settled that the conversion takes place in wills as from the death of the testator.”

Mr. Pritchard, in his work on Wills and Administration, in paragraph 457, bottom of page 425, says:

“And where the will directed the land to be sold on the death of testator’s widow, and the proceeds to be di-

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vided among his children, the personal representative of a child dying before the widow was held entitled to the share to which the child would have been entitled, had he survived the period fixed for the sale."

In 6 Am. & E. Enc. of Law (1st Ed.), p. 668, the author states that "conversion will in general be considered to take place in the case of a will from the death of the testator."

This question arose in the case of *Green v. Davidson*, 4 Baxt., 491. On page 493 of the opinion of this court the case is thus stated:

"By the will of Joseph Keller, this land is directed to be sold upon the death of the widow and converted into money, and the money to be divided among his children. This disposition of the land is absolute, and not dependent upon any condition, or subject to the discretion of his executors. In such case it seems well settled by authority that the estate passes to the legatees as personalty, and where any of the children, as in this case, died during the life of the widow, or before the land is to be sold, their share will vest in their personal representative. This proceeds upon the ground that the land is to be regarded as converted into money and disposed of by the will as money."

Citing authorities, and continuing:

"From this it results that neither the heirs of F. A. Keller (the son of Joseph Keller, one of the legatees under the will, who died before the life estate fell in) nor their guardian can in any respect recover, but his per-

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sonal representative is the party entitled to the legacy under the will; that is, the share of the proceeds of the sale of the land." *McElroy v. McElroy*, 110 Tenn., 137, 73 S. W., 105; *Wheless v. Wheless*, 92 Tenn., 295, 21 S. W., 595.

In the case of *Bedford v. Bedford*, 110 Tenn., 204, 75 S. W., 1017, the limitation upon this doctrine of equitable conversion is illustrated. The court said as follows:

"The doctrine of conversion of real into personal property is recognized in this State, and the provision for the sale of real estate and distribution of the proceeds contained in a will is evidence sufficient to show the intention of the testator to make such conversion, and is effective to do so. But the intention to make the conversion must be clear and certain, and the direction to sell the land for that purpose imperative and unconditional. The intention must appear by explicit direction, and the conversion be obligatory upon the executor or trustee. If the direction to sell is made to depend upon contingencies, or discretion is given to the executors to sell for distribution, or divide the property in kind, the intent of the testator to make conversion is not sufficiently evident and positive, and none is effected." Citing *Wheless v. Wheless*, 92 Tenn., 296, 21 S. W., 595; *Wayne v. Fouts*, 108 Tenn., 145, 65 S. W., 471.

Waiving the question whether an equitable conversion takes place on the death of the life tenant, Mrs. Catherine Owens, or whether it takes place on the death of the testator, the paramount inquiry in this case is wheth-

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er, under the provisions of this will, there was an equitable conversion of the real estate at any time.

"To operate as a conversion, the direction that the form of the property be changed must be imperative, in the sense of being positive and unmistakable. If the intention, as gathered from the whole instrument, be left in doubt, or the direction allows the trustee to sell or not as he deems best, the court is not at liberty to say that conversion has taken place, but must deal with the property according to its actual form and character." *Wheless v. Wheless*, 92 Tenn., 296, 21 S. W., 595.

An analysis of the will in question shows the following directions of the testator, viz.: (1) Personalty and realty given to widow during life, for the joint use of herself and the children. (2) Widow authorized to dispose of personalty at discretion. (3) On arrival at age of any child, widow authorized to give said child any property she (the widow) may desire, preserving however, equality among all the children in the distribution of said estate. (4) Widow empowered to sell any real estate she may think best, with the advice and counsel of her friends. (5) At the death of widow, whatever property there may be (remain) "I wish sold and equally divided among my children."

It is observed that the testator in this last clause directs the sale of whatever property may remain at the death of his widow, and the equal distribution of the proceeds among his children, but this clause must be considered in view of the entire context of the will, with

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all of its provisions and limitations. It will be observed that the testator has provided, by the third clause of his will, that the widow may make settlements of any property she may think proper on any of the children on their arrival at age, and by the fourth clause the widow is empowered to sell any real estate she may think best with the advice and counsel of her friends. Of course, however, the proceeds of such sale would be impressed with the trust and limitations of the will, namely, for the joint use of the wife and children during the life of the wife; but under the third clause of the will it is apparent that the widow, during her life tenancy, is authorized to divide up the entire estate among her children, and thus leave no realty for an equitable conversion at her death. As already seen, it was adjudged in *Bedford v. Bedford* that no equitable conversion arose under the will of Benjamin W. Bedford, for the reason discretion was given his executors to sell his property for distribution, or to divide it in kind among his devisees. It equally appears from the will now under consideration that the widow of the testator was authorized to divide up this entire estate among her children at her discretion, preserving, however, equality in its distribution. It thus appears that the equitable conversion of the real estate into personalty at the termination of the life tenancy would be wholly defeated in the contingency the wife chose to exercise the discretion vested in her by the terms of the will. In order to work an equitable conversion, as we have seen, the rule is: The direction of

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the testator must be absolute and imperative, and, if there is any doubt or contingency controlling the exercise of judgment on the part of the executor or trustee, there is no room for the application of this doctrine.

For the reasons stated, the decree of the chancellor, sustaining the demurrer is affirmed.

Williams v. Mining and Manufacturing Co.

R. A. WILLIAMS *et al.* v. COAL CREEK MINING & MANUFACTURING COMPANY *et al.*

(Knoxville. September Term, 1905).

TENANTS IN COMMON. One can recover only his undivided interest in ejectment against a defendant in without right.

The recovery of a tenant in common, in an action of ejectment against a defendant in without right, will be confined, both in right and possession, to his undivided interest in the property, and he is not entitled to recover the possession of the whole tract of land, to be held by himself and his cotenants.

Cases cited and approved: Barrow v. Nave, 2 Yer., 227; Dewey v. Brown, 2 Pick. (Mass.), 387; Moberly v. Bruner, 59 Pa. St., 483; Gray v. Givens, 26 Mo., 303; Marshall v. Palmer, 91 Va., 344; Overcash v. Richie, 89 N. C., 384; King v. Hayayy, 51 Kan., 504; Mathis v. Boggs, 19 Neb., 698; Kirk v. Boling, 20 Neb., 261; Johnson v. Hardy, 43 Neb., 358.

Cases cited and disapproved: Williams v. Sutton, 43 Cal., 71; Newman v. Bank, 80 Cal., 368; Hardy v. Johnson, 1 Wall., 371; Barnett v. French, 1 Conn., 364; Hubbard v. Foster, 24 Ver., 542; Crook v. Vandervoort, 13 Neb., 505; Sowers v. Peterson, 59 Tex., 523.

FROM MORGAN.

Appeal from the Chancery Court of Morgan County.
—D. L. LANSDEN, Chancellor.

Williams v. Mining and Manufacturing Co.

PRITCHARD & SIZER & J. M. KING, for complainants.

LUCKY, SANFORD & FOWLER, for defendants.

MR. CHIEF JUSTICE BEARD delivered the opinion of the Court.

This is an ejectment suit brought by a portion of the heirs of the grantee to recover possession of a 5000-acre tract lying in Morgan county. The court of chancery appeals heard the cause, and, sustaining the bill of complainants, among other things, decreed, that as against defendants, who were in without right, the complainants, although owning fractional undivided parts, were entitled to the possession of the whole tract, to be held for themselves and such other parties as might be able to show, thereafter, they were tenants in common with them. At a former term of this court the cause was heard upon appeal and the decree of that court was in all things affirmed. A petition for rehearing, however, was filed by the defendants, asking for a rehearing on the point above indicated, it being insisted that as a matter of right, and upon authority, one tenant in common entitled to a fractional portion of an entire tract should not, as against a party in possession, be permitted to recover the whole.

It will be seen that the text-writers are not agreed on the question of practice in such cases. Mr. Freeman, in his work on Cotenancy and Partition, section 300, lays down the rule thus: "A tenant in common is, as against

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every person but his cotenant, entitled to every part of the common land." On the other hand, Mr. Newell, in his work on Ejectment, 130, says: "If by the common law tenants in common present and co-operating cannot maintain a joint action of ejectment for the possession of the premises owned by them jointly, how is it that one of them suing alone can recover the whole of the joint premises as against a stranger, the judgment having the effect of a joint recovery? It seems illogical to say that it can. The better rule seems to be that the recovery of a joint tenant, in the absence of statutory enactment to the contrary, must be limited to his right or interest in the premises. For it might well be that the other tenants in common may prefer the person in actual possession of the premises to the person seeking to recover it from him."

Upon examination it will be found that the same diversity of opinion on this subject exists among the courts. In California, beginning possibly with *Williams v. Sutton*, 43 Cal., 71, and certainly including, if not ending, with *Newman v. Bank*, 80 Cal., 368, 13 Am. St. Rep., 169, the uniform holding seems to be that one tenant in common may sue in ejectment and recover the entire premises against all persons save cotenants and those claiming under them. Upon the authority of these cases rests *Hardy v. Johnson*, 1 Wallace (U. S.), 371. The same rule, in one form or another, is recognized in *Barnett v. French*, 1 Conn., 364, 6 Am. Dec., 241; *Hab-*

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bard v. Foster, 24 Ver., 542; *Crook v. Vandervoort*, 13 Neb., 505; *Sowers v. Peterson*, 59 Tex., 523.

To the contrary, there are many courts of the highest respectability which limit the recovery of a tenant in common; who sues alone to a right of possession, corresponding in limit with the undivided interest which he establishes in the property, and letting him in to its enjoyment with the party in possession whether or not he be a stranger to the title. Among the cases recognizing this limitation are: *Dewey v. Brown*, 2 Pick. (Mass.), 387; *Moberly v. Bruner*, 59 Pa. St., 483, 98 Am. Dec., 360; *Gray v. Givens*, 26 Mo., 303; *Marshall v. Palmer*, 91 Va., 344, 50 Am. St. Rep., 838; *Overcash v. Richie*, 89 N. C., 384; *King v. Hayayy*, 51 Kan., 504, 37 Am. St. Rep., 304.

In a very elaborate note to the case of *Marshall v. Palmer*, supra, in the 50th volume of the American State Reports, Mr. Freeman, the editor, while maintaining the logical soundness of the rule, already cited from his work on Cotenancy & Partition, and that this rule is indorsed by the weight of American decisions, admits "that there is a growing inclination on the part of the courts to restrict the recovery by a tenant in common even as against a stranger to the title to the same extent that he would be if his recovery was against a cotenant; or, in other words, simply to enter a judgment entitling the plaintiff to be put in possession of the property, leaving him to share the possession with the defendant, as though he also were an owner of an undivided interest,

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and as such entitled to share in the possession of the premises."

As an indication of this tendency, the action of the supreme court of Nebraska may be referred to. In *Crook v. Vandervoort*, supra, that court announced the rule which Mr. Freeman in his work regards as a sound and logical one. But in *Mathis v. Boggs*, 19 Neb., 698, 28 N. W., 325, that case was expressly overruled, and after an examination of the statutes of the State, similar in essential particulars to those of Tennessee, governing the action of ejectment, it was held that a tenant in common against one in possession without right, could recover possession only to the extent of his own title. This latter case has been expressly affirmed by that court in *Kirk v. Boling*, 20 Neb., 261, 24 N. W., 928, and *Johnson v. Hardy*, 43 Neb., 368.

It is well settled that at common law, tenants in common could not join in a single demise. This was for the reason that their interests were several, and, though existing in the same property, they were distinct and different. The courts recognizing and enforcing the common law rule have done so with the respect to the distinctness of these interests. So, in *Moberly v. Bruner*, supra, the supreme court of Pennsylvania, said: "The plaintiff in ejectment must recover on the strength of his own title, and his recovery must, consequently, be in accordance with his title. Tenants in common have several and distinct titles and estates, independent of each other, so as to render the freehold several also. They are

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separately seized and there is no privity of estate between them. If tenants in common are separately seized and there is no privity of estate between them, if they must sue separately or joint, according to the circumstances of the case, the nature and the cause of the action, or the character of the injury to be redressed, it follows as a necessary corollary that one tenant in common cannot maintain ejectment or sue and recover in any form of action for the interest and benefit of the others."

We think this a correct statement of the relations of tenants in common, and that the limitation upon the right of such a tenant, who sues alone for his interest in property, is logically deduced from this relationship. We are satisfied that while the common law rule that tenants in common should not join in an action of ejectment has been modified in Tennessee, yet, from *Barrow's Lessee v. Nave*, 2 Yerg., 227, it has been the established practice to confine the recovery of a tenant in common both in right and possession to his undivided interest in the property in controversy, and we do not think that the sections of the Code regulating actions of ejectment in any way affects this practice.

We are satisfied that the rule announced by Mr. Newell, and already quoted from his work on Ejectment, is sound and logical.

The decree of the court of chancery appeals, therefore, holding otherwise, is reversed, and the decree of the chancellor is in all things affirmed.

Coal, Iron & Ry. Co. v. Smith.

LA FOLLETTE COAL, IRON & RAILROAD COMPANY v. SMITH.

(Knoxville. September Term, 1905).

1. **SUPREME COURT.** Suggestion of diminution of record must be made before case is finally disposed of.

The rule of this court is that suggestions of diminution of the record shall be made before a case is called for trial, in order that the record may be perfected before the hearing; and it has been uniformly held that such suggestions and leave to perfect the record must be applied for before the case is finally disposed of.

2. **SAME.** Same. Case in judgment.

The record filed in this court failed to show a motion for a new trial and the grounds thereof, and such defect was pointed out by defendant in error in his reply brief and relied upon as one of the reasons why the judgment should be affirmed, but no effort was made to remedy it until after affirmance of the judgment.

Held: That it was too late, on petition for rehearing, to suggest a diminution of the record and have the same perfected.

Cases cited and distinguished: *Hinton v. Ins. Co.*, 110 Tenn., 114; *Gaut v. Wimberly*, 99 Tenn., 497.

FROM CAMPBELL.

Appeal in error from the Circuit Court of Campbell County.—G. MC. HENDERSON, Judge.

Coal, Iron & Ry. Co. v. Smith.

H. B. LINDSAY and W. A. OWENS for Coal, Iron & Ry. Co.

AGEE & PETERS and LUCKY, SANFORD & FOWLER for Smith.

MR. JUSTICE WILKES delivered the opinion of the court.

This is a petition to rehear.

One of the grounds upon which the case was decided originally in this court was that the minutes of the court below did not show that the motion for a new trial and the grounds therefor were set out, and therefor that the assignments of error could not be considered in this court.

A certificate is now made, after the case is decided, by the clerk of the court below, to the effect that the motion for a new trial and the grounds for the same were regularly set out upon the minutes of the court below, and that it should have so appeared in the transcript to this court, and a certified copy of said minute entries is presented with the petition, and the petitioner asks to suggest a diminution of the record, and to have it made perfect by the insertion of this certified matter.

The rule of this court is that suggestions of diminutions of record shall be made before a case is called for trial, and at such time as will give opportunity to have the record perfected before hearing, or the imperfection of the record will be waived, provided, however, that any

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such amendment thus supplied, brought before the court before the case is finally disposed of, after hearing, may be considered.

Under this rule, it has been uniformly held by the court that suggestions of diminution and leave to perfect the record must be applied for before the case is finally disposed of.

In the case of *Hinton v. Insurance Co.*, 110 Tenn., 114, 72 S. W., 118, the court allowed a suggestion of diminution to permit the record to show that the bill of exceptions was filed in time in the lower court, and this was done after the hearing and decision of the case, but was put upon the ground that the question of when the bill of exceptions was filed was not raised on the trial of the case, but was observed by the court, and raised upon its own motion in the decision of the case, the attorneys having overlooked the fact; and it was upon this ground that the petition was allowed at that stage of the proceeding. See, to same effect, *Gaut v. Wimberly*, 99 Tenn., 497, 42 S. W., 265.

In the present case, however, the fact that the record was defective upon the ground stated was relied upon on the trial of the case as one of the reasons why the judgment should be affirmed, and was set out in the reply brief; and the attention of counsel was thus brought to the defect, and no effort was made to correct it. The case was under advisement in the hands of the court for about a week, and no effort was made during that time to correct the defect.

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In the original opinion handed down it was stated, in addition, that the case had been considered by the court as if the record were perfect; and the court announced that it found no error in the proceedings in the court below.

We think, therefore, that there is no reason to relax the rule, and, inasmuch as opposing counsel insist upon it, it must be enforced, and the petition to rehear is dismissed.

Chattanooga v. Keith.

MAYOR and ALDERMEN of Chattanooga v. HUGH KEITH.

(*Knoxville*. September Term, 1905).

CONSTITUTIONAL LAW. Statute denying appeal from city court judgments not exceeding ten dollars is not unconstitutional.

A clause in the legislative charter of a city, providing that in "all civil cases in which the fine imposed does not exceed ten dollars, the judgment of the city court shall be final, and no appeal shall lie therefrom," is constitutional and valid.

Constitution cited and construed: Art. 6, secs. 1 and 2.

Cases cited and approved: *Martin*, Ex parte, 5 Yer., 456; *Sherer v. Lasson Co.*, 94 Cal., 354; *People v. Richmond*, 16 Colo., 274; *Branson v. Studebaker*, 123 Ind., 460; *Dismukes v. Stokes*, 41 Miss., 430.

FROM HAMILTON.

Appeal from the Circuit Court of Hamilton County.
—M. M. ALLISON, Judge.

GEORGE W. CHAMLEE, for Chattanooga.

DOUGHTY & TITUS, for KEITH.

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MR. CHIEF JUSTICE BEARD delivered the opinion of the Court.

The only question in this case is as to the constitutionality of a clause in the charter of the city of Chattanooga, which is as follows: "In all civil cases in which the fine imposed does not exceed \$10, the judgment of the city court shall be final, and no appeal shall lie therefrom."

The authorities agree that the remedy by appeal was unknown to the common law and was only employed for the review of cases of equity, ecclesiastical and admiralty jurisdiction; writ of error was the remedy to review judgments of the common pleas and other inferior courts of record when the proceedings were according to the course of common law. 4 Archibald Pr., 4; *Wiscart v. Dauchy*, 3 Dall. (U. S.), 321. Consequently the remedy by appeal in actions at law is altogether of constitutional or statutory origin. 2 Cyc., pp. 507-517.

So, the authorities hold that where the constitution does not define the specific limits of appellate jurisdiction, this may be abridged or extended by the legislature as public policy may require; but it has been held, and we think properly, that even in the absence of legislative provision, the establishment of an appellate court by the constitution is an implied declaration that some right of appeal exists which cannot be unreasonably restricted by statute law. 2 Encyc. Pl. & Pr., 14. Illustrating the first proposition in the above paragraph is the case of *Sherer v. Lasso county*, 94 Cal., 354, where it was ruled that a constitutional provision, that the appellate juris-

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diction of the supreme court shall extend to cases arising in the inferior courts, restricts that jurisdiction to the mode and extent prescribed by the legislature; and, as authority for the last proposition therein contained, are the cases of *People v. Richmond*, 16 Colo., 274, and *Branson v. Studebaker*, 133 Ind., 460, in which is held that from the establishment of an appellate court it is to be implied there shall be a review to a reasonable extent of the judgment of inferior tribunals, and that the right of appeal must be reserved for the supreme court, at least in cases involving legal questions of great public importance.

The constitution of the State of Mississippi did not, save in most general terms, fix the jurisdiction of the supreme court. The provision of that constitution conferring this jurisdiction was as follows: "The supreme court shall have such jurisdiction as properly belongs to the court of appeals." The question of the right of appeal under this clause was considered by the supreme court of Mississippi in *Dismukes v. Stokes*, 41 Miss., 430. In the course of the opinion delivered in that case, it was said: "The subject is one depending on general considerations of public policy which for the most part must be determined by the legislature, subject to such restriction on their general powers as are contained in the constitution. For this reason, by universal acquiescence, the power is conceded to the legislature to prescribe the form of action and the modes of procedure in courts, and to limit the case and the extent

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to which certain remedies may be pursued. The only exception to this power is where specific rights are secured to a party in the constitution with a remedy indicated for their protection, in which case the right and remedy thus guaranteed would be beyond the legislative power. But generally all these questions pertain to the remedy, and are subject to the power of the legislature. The right to prosecute a writ of error or an appeal in this, or any inferior court, is a matter pertaining to the mode of judicial procedure or remedy. It is not guaranteed as a matter of right in the constitution, and though it is possible that this court, in the light of judicial procedure in England, . . . from whose jurisprudence our system is mostly derived, might, in the absence of legislative enactment on the subject, be disposed to favor the right when sanctioned by established precedent, yet, when the legislature has passed laws regulating the mode of proceeding, and limiting the cases and the courts in which the right may be exercised, the rules prescribed must be followed because they are clearly such as the legislature had power to enact. Nothing appears to be more clearly within the legislative power over matters pertaining to public than the question, in what cases and in what courts shall a party be entitled to an appeal or writ of error? In such case, the question to be settled is whether or not it would best promote the purposes of justice and the peace and quiet of the community to allow a matter once or twice regularly adjudicated in the courts to be further litigated in other courts; and this

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question depends not upon matter of legal right, but upon considerations of public policy. It turns upon the grave question, at what point should litigation in particular cases cease, and what rule in relation to a particular case would best promote the public good? Where the legislature determines this question and fixes the rule in any particular case, the question is thereby settled”

Certainly there is very great force in these suggestions. It would seem, in the absence of a constitutional provision defining the limits of appeal, that it should be left, in the interest of the public at large, to the legislature to determine how far dissatisfied litigants should be permitted to carry their causes through the various courts. In such cases, as is the present, where a trial, according to the form of the common law, is given in a court of competent jurisdiction, resulting in an insignificant judgment, public policy would seem to dictate the wisdom of making such judgment final. In our cities, particularly, many ordinances are passed looking to the comfort and health of their citizens as well as to the good order of society, the infraction of which is visited by the infliction of small penalties, and if appeals were tolerated from minor judgments, the superior courts would be crowded to overflowing, and the cost of such litigation would be greatly increased. We think that legislation, such as is here impeached, is dictated by a wise public policy, and unless it does run counter to some clause of the constitution of our State, it should be

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upheld. We are satisfied, upon an examination, there will be found nothing in it to defeat this legislation. The only parts of the constitution which bear upon the present question are sections 1 and 2 of article VI. The first of these sections reads as follows: "The judicial power of this State shall be vested in one supreme court, and in such circuit, chancery and other inferior courts as the legislature shall from time to time ordain and establish; in the judges thereof, and in the justices of the peace. The legislature may also vest such jurisdiction in corporation courts as may be deemed necessary"

Sec. 2 provides that "the supreme court shall consist of five judges, of whom not more than two shall reside in any one of the grand divisions of the State The jurisdiction shall be appellate, under such restrictions and relations as may from time to time be prescribed by law. . . ."

It will be observed in these sections there are fixed no definite limits of the right of appeal. While it is true the establishment of inferior tribunals with a supreme court of review implies, as has already been stated, the right of appeal on the part of litigants within reasonable bounds, yet, both in the matter of restriction and regulation of that right, the constitution leaves it to the wisdom of the legislature, or the ruling of the court. As early as the case of *Andrew L. Martin, ex parte*, 5 Yerger, 456, it was held, even without the aid of the statute, that an appeal in the nature of a writ of error would

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not lie from a judgment of an inferior court punishing one for contempt. This ruling was affirmed in numerous cases thereafter, and while some or all these cases involved the right of personal liberty, yet it was never suggested by the counsel seeking to have such judgments revised, that to deny the right of review was to deprive the party of the protection of the constitution. So in habeas corpus cases, it was uniformly held that there was no appeal from judgments rendered therein until this right was given in chapter 157 of the Acts of 1887. Again, we have a striking illustration of the power of the legislature to narrow, or abridge appeal, in the statute organizing the court of chancery appeals. That court by this statute is made the final arbiter of the facts involved in the controversy. It may be in a particular case, that the inferences of fact drawn by that court are unwise, yet they are conclusive upon the litigant and there is left open to him, when dissatisfied with the decree of that court, only the right to have examined, upon appeal or writ of error to this court, the questions of law which arise upon that court's finding of facts.

This statute, though severely arraigned as to this feature, in the earlier days of that court, was held, after a careful consideration, to be constitutional, and from that time to the present no one has challenged the conclusiveness of the finding of facts by that court.

If it be true that the legislature had the right to stop all litigation, however important it might be, so far as the facts were concerned in an intermediate court, as is

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the court of chancery appeals, then certainly within constitutional limits it could say that from small judgments, such as is in question in the present case, there shall be no appeal.

We entertain no doubt as to the constitutionality of this provision in the charter of Chattanooga, and the circuit judge was in error in holding otherwise. His judgment is, therefore, reversed. The cost of the cause will be paid by the defendant in error.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF TENNESSEE
FOR THE
MIDDLE DIVISION.

NASHVILLE. DECEMBER TERM, 1905

JAMES T. BASHAW, *Exp.*, v. C. L. TEMPLE et al.

(Nashville. December Term, 1905).

1. **PRO CONFESSO.** Not to be set aside except for good cause and upon answer showing merits.

It is erroneous for the chancellor to set aside an order *pro confesso* without good cause shown and without requiring the filing of an answer showing merits. (*Post*, pp. 598, 599.)

Code cited and construed: Sec. 6185 (S.); sec. 5118 (M. & V.); sec. 4375 (T. & S. and 1858).

2. **SAME.** Admits bill as against defendants served with process; and puts in issue bill as against nonresidents, when.

An order *pro confesso* against defendants served with process amounts to an admission of the allegations of the bill; but such order against defendants proceeded against by publication as nonresidents without attachment of property only puts the bill in issue. (*Post*, p. 599.)

Code cited and construed: Sec. 6181 (S.); sec. 5114 (M. & V.); sec. 4371 (T. & S. and 1858).

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- 3. JURISDICTION.** For sale of lands to pay debts of decedent in chancery and circuit courts, and concurrent in county court. Jurisdiction of the chancery and circuit court conferred, by sections 4000 to 4003, inclusive, of Shannon's Code, for the sale of the lands of a decedent for the payment of the debts after the exhaustion of the personalty, is possessed by the county court as concurrent with said courts under sections 6071 and 6112 of said Code. (*Post*, p. 600.)

Code cited and construed: Secs. 4000-4003, 6071, 6112 (S.); secs. 3105-3108, 5005, 5045 (M. & V.); secs. 2267-2270, 4233, 4302 (T. & S. and 1858.)

Cases cited and approved: *Kindell v. Titus*, 9 Heis., 727; *Burgner v. Burgner*, 11 Heis., 731; *Linnville v. Darby*, 1 Bax., 307; *Norville v. Coble*, 1 Lea., 467.

- 4. ADMINISTRATION.** Suggestion of insolvency is not effective or operative, unless publication is made.

The suggestion of insolvency of the estate of a decedent must be followed by the publication thereof prescribed by statute to give the insolvency proceeding the status of a *lis pendens* in the county court, and to operate as an injunction against suits against the personal representative. (*Post*, pp. 602, 603.)

Code cited and construed: Secs. 4068-4070, 4072 (S.); secs. 3173-3175, 3177 (M. & V.); secs. 2328, 2330-2332 (T. & S. and 1858).

Cases cited and approved: *Rhea v. Meredith*, 6 Lea, 605, 607, 608; *Bates v. Elrod*, 13 Lea, 156, 159.

- 5. SAME.** Same. Jurisdiction in chancery to sell lands to pay debts, though estate is worth less than one thousand dollars, where there has been no suggestion of insolvency and publication thereof.

The chancery court has jurisdiction of a suit to subject the lands of a decedent to the payment of his debts, though the estate is of less value than one thousand dollars, where there has been no suggestion of insolvency and publication thereof, or where there has been such suggestion, but no publication thereof. (*Post*, pp. 599, 603.)

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Code cited and construed: Secs. 4000-4003, 4070, 4072 (S.); secs. 3105-3108, 3175, 3177 (M. & V.); secs. 2267-2270, 2330, 2332 (T. & S. and 1858.)

6. **SAME.** Realty and personalty specifically willed must contribute equally to payment of debts.

Where the realty and personalty are specifically devised and bequeathed, both must contribute equally to the payment of the debts. (*Post*, p. 604.)

FROM DAVIDSON.

Appeal from the Chancery Court of Davidson County.

—JOHN ALLISON, Chancellor.

BAXTER SMITH, for complainant.

JAMES L. WATTS, for defendants.

MR. JUSTICE NEIL delivered the opinion of the court.

The bill alleged the death of Mrs. Temple, the making and probating of her will nominating complainant as executor, his appointment and qualification as such in the county court of Davidson county, the suggestion of insolvency, the existence of certain debts mentioned in detail, and the fact that the personalty was practically of no value, but that the estate, real and personal, exceeded the value of \$1,000; and the prayer was that the administration be transferred from the county court to the chancery court, and be there conducted.

One of the defendants filed an answer, admitting all of the allegations of the bill, and there was an order *pro confesso* as to all of the other defendants.

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The chancellor erroneously set aside the order *pro confesso*, without any good cause having been shown therefor, so far as the record discloses, and without requiring the filing of an answer showing merits. Shannon's Code, section 6185.

All of the defendants against whom the order *pro confesso* was entered, save one, had been served with process, and the order against them amounted to an admission of the allegations of the bill.

One of the defendants, however, V. D. Temple, was proceeded against by publication as a nonresident without attachment of property, and as to him the order only but the bill at issue. Shannon's Code section 6181.

In this posture of the case the chancellor referred the cause to the master to make a report upon debts and as to the amount and value of the property of the estate real and personal. A report was made pursuant to this order, but was set aside, and the former reference was renewed. A report was made by the master, in response to this reference, showing that debts were owing to the amount of \$100.90, setting out the names of the different creditors, that personal assets were left to the value of \$100, and two tracts of land, one, composed of twelve acres, worth \$360, and another, composed of twenty-three acres, worth the same, or \$720 as the value of all the real estate, and \$800 as the value of the whole estate, real and personal.

The chancellor thereupon dismissed the bill on the ground that the chancery court had no jurisdiction, since the report showed that the estate real and personal did

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not amount to \$1000 in value. Shannon's Code, section 4102.

The court of chancery appeals reversed the decree of the chancellor, and remanded the case to the chancery court for further proceedings, on the ground that, while the bill could not be properly retained in the chancery court as a bill for the administration of an insolvent estate, yet that it could be treated as one filed under the act of 1827 (Shannon's Code, sections 4000—4003), and as such should have been retained.

The difficulty suggested by the facts stated arises out of the progressive nature of our legislation upon the subject. Under the act of 1827, carried into Shannon's Code at sections 4000—4003 (Code 1858, sections 2267-2270), jurisdiction was vested in the circuit and chancery courts of the State to sell land for the payment of the debts of decedents after the exhaustion of the personal estate. Construed in connection with Shannon's Code section 6071 (Code 1858, section 4233, based on Acts 1837-38, p. 222, c. 156), and section 6112 (Code 1858, section 4302), it has been held that the jurisdiction of the county court is concurrent with that of the circuit and chancery courts under the said act of 1827. *Burgner v. Burgner*, 11 Heisk., 731; *Kindell v. Titus*, 9 Heisk., 727; *Norville v. Coble*, 1 Lea, 467; *Linnville v. Darby*, 1 Baxt., 307.

The purpose of the act of 1827 was to correct two evils which had grown up under the act of 1784 in the administration of estates, viz., the great accumulation of costs

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consequent upon each creditor attempting to obtain satisfaction out of the real estate descended to the heirs, through separate suits, and the consumption of the estate by a portion only of the creditors to the entire deprivation of others. *Dulles v. Read*, 6 Yerg., 53, 65, *et seq.* It was held in the case just referred to that upon the filing of the bill, an injunction might issue forbidding the prosecution of separate suits and compelling a settlement of the whole estate in the one litigation, wherein the personal assets would be ascertained and applied *pro rata* upon debts, and then a sufficiency of the land sold for the payment of debts, or in case there should not be enough for the payment of all, then that the proceeds of the land should be applied *pro rata* upon the debts.

But despite this act there were still frequent instances in which some creditors were enabled to obtain an unfair advantage of the administrator, or over other creditors, by means of very prompt proceedings, and also as the result of the higher nature of certain classes of debts, over others, entitling the former to priority, as pointed out in *Mosier v. Zimmerman*, 5 Humph., 62. To remedy these defects in the system, the insolvency acts of 1833 and 1838, referred to in that case, were passed. The provisions of these acts were much enlarged by subsequent statutes which are embodied in Shannon's Code, sections 4064 to 4138, inclusive, by which means a complete system for the administration of insolvent estates was created.

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This system can be put into operation in any case by a simple suggestion of insolvency made to the clerk of the county court by the administrator or executor, or by any creditor (Shannon's Code, sections 4068, 4069), followed by a certain publication provided by the Code (Shannon's Code, sections 4070, 4072). This suggestion of insolvency and the publication thereof, in the manner provided by law (Shannon's Code, section 4070), operates as an injunction in all cases against the bringing of any suit, before any jurisdiction whatever against the administrator or executor of such insolvent estate (Shannon's Code, section 4072). It at once becomes the duty of all creditors to file their demands within the time fixed (Shannon's Code, section 4070), with the exception of those involved in pending suits, and these may proceed to judgment, and the judgments shall then be filed (Shannon's Code, section 4073). Provisions are made for the contesting claims (Shannon's Code, sections 4074-4076), the scheduling of assets (Shannon's Code, section 4077), and the sale of the lands of the estate, and the appropriation of the proceeds upon the debts (Shannon's Code, sections 4078-4091). The foregoing all pertain to the procedure in the county court. There are subsequent provisions (Shannon's Code, sections 4102-4138), which pertain to the transfer (Shannon's Code, section 4121) of the case to the chancery court and its administration of the estate in that tribunal.

But the mere suggestion of insolvency does not of itself amount to the bringing of a suit in the county court.

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To have this effect it must be followed by the publication provided for in Shannon's Code, sections 4070, 4072. Then the insolvency proceedings attains the status of a *lis pendens*, and not before. *Bates v. Elrod*, 13 Lea, 156, 159; *Rhea v. Meredith*, 6 Lea, 605, 607, 608.

In the present case it does not appear that anything further was done in the county court than a mere suggestion of insolvency. No publication in that court is shown. Hence the estate of Mrs. Temple has not yet been brought within the scope of the insolvency statutes.

The decree of the chancellor was based on the assumption that the county court had acquired jurisdiction of the case. Acting upon this assumption, and upon the fact that the estate real and personal did not equal in value \$1,000, he declined to grant an order removing the case from the county court, but on the contrary dismissed it out of the chancery court.

It is clear that, if no suggestion of insolvency had been made, the chancery court would have had jurisdiction of the controversy under the act of 1827, although the property of the estate was of less value than \$1,000, inasmuch as the act of 1827 imposes no such limitation upon the jurisdiction of the court when acting under that statute.

It may seem somewhat singular that the chancery court should have jurisdiction of the small estate referred to in the one event and not in the other; but so our statutes read, and we cannot change them.

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It results that the court of chancery appeals acted correctly in reversing the chancellor and remanding the cause.

However, one difficulty is suggested by the facts recited in the report of the master to the effect that there was personal estate to the value of \$100, and from the further fact, shown in the findings of the court of chancery appeals, that this personalty was specifically bequeathed, and that the twenty-three acres of land sought to be sold, was specifically devised. The result of these facts would be that the two kinds of property would stand upon an equal footing as respects the payment of debts, and would have to contribute equally. Pritchard on Wills, section 471, p. 453; 1 Am. & Eng. Ency. Law (2d Ed.), p. 55, 56.

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PREWITT-SPURR MANUFACTURING COMPANY v. FRANK
WOODALL,*(Nashville. December Term, 1905.)*

1. **PERSONAL INJURIES.** Not permissible to show that defendant has indemnity insurance against loss by accidents caused by his negligence.

In the employee's action for personal injuries caused by the alleged negligence of the employer, it is not permissible to show that the defendant is insured in an accident and indemnity company against loss in case of a recovery against him on account of his negligence. (*Post*, p. 608.)

2. **NEW TRIAL.** For misconduct and improper argument of counsel in attempting to get incompetent and prejudicial evidence before the jury which is not cured by court's admonition, nor counsel's withdrawal.

Where, in such action as stated in the foregoing headnote, the plaintiff's counsel thrice attempted to show such indemnity insurance, notwithstanding the court's rejection of such evidence as incompetent; and in his concluding argument, said counsel made remarks sufficient to cause the jury to believe that defendant was so insured, which was prejudicial to the defendant, and the harm thus done could be neutralized neither by the admonition of the court to the jury not to consider that part of the argument, nor by the counsel's withdrawal of the same, and a new trial sought by defendant for such misconduct and argument, and erroneously refused by the trial judge, will be granted by the supreme court.

Cases cited and approved: *Manigold v. Traction Co.* (Sup.), 80 N. Y. Supp., 861; *Iverson v. McDonnell*, 36 Wash., 75.

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8. **SAME.** Same. Granted by supreme court for misconduct of counsel, though refused by the trial judge, when.

While ordinarily the supreme court will not interfere with the exercise of legal discretion by the circuit judge in refusing a new trial for the misconduct of counsel, yet, where there is persistent abuse of well-established and universally recognized rules of correct practice to the prejudice of the losing party, the supreme court will interpose, and grant a new trial. (*Post*, p. 609.)

FROM DAVIDSON.

Appeal from the Circuit Court of Davidson County.
—J. A. CARTWRIGHT, Judge.

W. H. WILLIAMSON, for plaintiff in error.

J. B. DANIEL and PAUL W. HOGGINS, for defendant in error.

MR. CHIEF JUSTICE BEARD delivered the opinion of the Court.

Frank Woodall, a minor about fifteen years of age, by his next friend, brought this suit to recover damages for an injury received by him while employed in the manufactory of the plaintiff in error, resulting from the alleged negligence of his employer. There was a verdict

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and judgment for \$3,700 in favor of the plaintiff below. The cause is before us by appeal in the nature of writ of error.

Many errors are assigned upon the action of the circuit judge. All of these may be pretermitted, save one, which is determinative of the case upon the present record.

During the cross-examination of the surgeon who rendered professional services to young Woodall at the time of and subsequent to the injury, and who was introduced as a witness by the plaintiff in error, the counsel for the defendant in error asked him as follows: "Are you not the regular employed doctor of the insurance company?" Upon exception the trial judge held this inquiry to be incompetent. Not satisfied with this ruling, the counsel put a question to the witness still more objectionable in form, to wit: "I will ask you if it is not a fact that the Prewitt-Spurr Manufacturing Co. is insured in an accident liability company for liability occurring from this accident?" The exception interposed to this interrogatory was likewise sustained by the court. Subsequently one of the officers of the company was introduced as a witness, when the same counsel, addressing the trial judge, in spite of the fact that it had been twice announced that by his questions the counsel was seeking to bring into the record impertinent matter, he said to the court: "Now I want to prove that this company is insured against accident." Again he was told this could not be done. Not satisfied, however, with unusual tena-

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city of purpose, the counsel in his concluding address to the jury returned once more to the subject of these various objections using these words: "But I will tell you this, and I think you can infer this much, that if the company had not had—I don't know whether it had or not; that is not for me to say; the evidence is silent upon it; but I say we are authorized from the testimony that is here to assume that this company had—some arrangement, with some insurance company or otherwise, by which it itself was not to bear the burden of any loss that might occur; otherwise, they would have been more careful regarding these dangerous things."

This line of argument, unsupported by evidence as it was, and bringing by indirection to the consideration of the jury that which the trial judge had three times ruled could not be shown directly, was at once objected to by the counsel of plaintiff in error who at the same time moved for a mistrial on account of this course of conduct of adversary counsel. The circuit judge declined to grant this motion, but sustained the objection, and said to the jury that they were not "to consider that part of the argument."

Should a verdict obtained under such conditions be permitted to stand? We think not. It is too well settled to require citation of authorities that in an action of negligence it is incompetent to show the defendant is insured against loss in case of a recovery against him on account of his negligence. Notwithstanding the incompetency of such evidence, yet in the present case it is

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apparent the counsel of the defendant in error as completely succeeded in getting the jury to believe that an indemnity policy against the accident in question was held by this company as if it had been proven distinctly by witnesses. The effect of this could not have been otherwise than prejudicial to the company, in that the jury would the more readily return a verdict against it upon the assumption that it was indemnified against loss.

It is true the counsel, after the admonition of the trial judge to the jury that they should not consider "that part of the argument" already quoted, sought himself to withdraw it; but the harm had been done, and neither admonition upon the part of the court nor withdrawal by the counsel could neutralize it. *Manigold v. Black River Traction Co.* (Sup.), 80 N. Y. Supp., 861; *Iverson v. McDonnell*, 36 Wash., 75, 78 Pac., 202.

We regard the present case; in the phase we have been considering, as exceptional in its character, and while, under ordinary conditions, this court will not interfere with the exercise of legal discretion by the circuit judge in the limitations he imposes or refuses to impose upon counsel in the conduct of their cases, and in declining a new trial by reason of such conduct, yet, when we find a persistent abuse of well-established and universally recognized rules of correct practice, it is then our duty to interpose, and to do that which should have been done by him. The judgment is therefore reversed, and the case remanded for a new trial.

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BRADFORD & CARSON v. MONTGOMERY FURNITURE COMPANY.

(Nashville. December Term, 1905).

1. **CONTRACTS.** Of sale of good will and to remain out of business creates an assignable right which is not annulled or forfeited by an assignment thereof, when.

A contract for the sale of the good will of a business and the agreement to remain out of that business in the city of its location for three years, based upon a stipulated and valuable consideration, creates property rights, valuable and assignable, and such contract is not annulled or forfeited by an assignment thereof by the purchasers to a corporation organized by them, and a sale and transfer of their business to such corporation, in which they become large stockholders, and the chief officers, nor by their repurchase of the corporation business and their resumption thereof as a partnership. (*Post*, pp. 615-626.)

Cases cited and approved: *Kramer v. Old*, 119 N. C., 1; *Dunlop v. Gregory*, 10 N. Y., 241; *Beard v. Sinex*, 6 Ind., 200; *Pemberton v. Vaughn*, 10 Adol. & El., 87, 59 Eng. Com. Law, 87; *Hitchcock v. Koker*, 6 Adol. & El., 98, 33 Eng. Com. Law, 438; *Francisco v. Smith*, 143 N. Y., 488; *Match Co. v. Roeber*, 106 N. Y., 473; *Ice Co. v. Denler*, 114 Mich., 297; *Jacoby v. Whitmore*, 49 Law T. (N. S.), 335.

Case cited and disapproved: *Bagby & Rivers Co. v. Rivera*, 87 Md., 400.

2. **SAME.** Same. Sale of good will and agreement to remain out of the business for three years for a sum to be paid in one year is a severable contract, and not dependent upon performance as a condition precedent, when.

A contract of the sale of the good will of business and an agreement to remain out of that business for three years in the

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city of its location for a stipulated sum to be paid in one year is not an entire, but a severable contract, and the performance thereof by the sellers is not a condition precedent to the payment of the stipulated consideration, and the breach thereof by the sellers in resuming business before the expiration of the three years will not defeat the collection of the consideration or purchase price, especially where the good will was delivered and enjoyed for a considerable period before the violation of the contract by re-engagement in the business. (*Post*, pp. 626-631.)

Cases cited and approved: *Coleman v. Hudson*, 2 Sneed, 465; *Jackson v. Byrnes*, 103 Tenn. 700; *Howard v. Taylor*, 90 Ala., 243.

3. **SAME.** Of sale of good will and the agreement to remain out of business are valid and enforceable, when.

An agreement to remain out of a certain business in the city of its location for three years, based upon a stipulated and valuable consideration, in connection with a sale of the good will of that business, is reasonable and only affords a fair protection to the good will sold, does not interfere with the general interests of the public, and is not in restraint of trade, but is valid and enforceable. (*Post*, p. 632.)

Cases cited and approved: *Jackson v. Byrnes*, 103 Tenn., 699; *Muse v. Swayne*, 70 Tenn., 251; *Electric Co. v. Hanks*, 171 Mich., 70; *Mell v. Mooney*, 30 Ga., 413; *Lufborough v. Henderson*, 30 Ga., 482; *Herbert v. Ford*, 29 Me., 546; *Warfield v. Boone*, 33 Md., 63.

4. **SAME.** Cross bill to recover damages for breach of agreement to remain out of business, and measure of damages.

Where the note given for the good will of a business and for the agreement of the payees to remain out of that business for three years in the city of its location for a stipulated sum to be paid in one year is sued on, after the payees have breached their contract by re-entering into business contrary to its provisions, the defendants are entitled to maintain their cross bill

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to recover such damages as they sustained by such breach of the contract, which are the natural and proximate results of such breach, to be set off against the decree upon the note, in whole or in part, and if the same exceeds such decree, to have a judgment for the excess; and if no such resulting natural and proximate damages can be shown, and, if the contract, as in this case, does not contain any criterion by which the damages may be ascertained, only nominal damages can be recovered, because uncertain, remote, and speculative damages are not recoverable. (*Post*, pp. 631-638.)

Cases cited and approved: *Jackson v. Byrnes*, 103 Tenn., 699; *Howard v. Taylor*, 90 Ala., 242; *Taylor v. Howard*, 110 Ala., 470; *Terry v. Eslava*, 1 Port., 273; *Burkhardt v. Burkhardt*, 47 Ohio St., 474; *Mitchell v. Read*, 84 N. Y., 556; *Mellesch v. Keen*, 28 Beav., 453; *Rawson v. Pratt*, 91 Ind., 9.

5. INJUNCTION. Most efficient remedy against violation of contract to remain out of a certain business.

The most efficient remedy against the violation of an agreement to remain out of a certain business and not to resume the same is an injunction inhibiting the defendant from continuing the business so resumed; and the jurisdiction of chancery to grant this relief is well established. (*Post*, p. 632.)

Case cited and approved: *Jackson v. Byrnes*, 103 Tenn., 699.

FROM DAVIDSON.

Appeal from the Chancery Court of Davidson County.
—JOHN ALLISON, Chancellor.

STOKES & STOKES, for Bradford & Carson.

CHAMBERS & AUST and M. B. & BOYTE HOWELL, for
the Furniture Company.

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MR. JUSTICE SHIELDS delivered the opinion of the Court.

Complainants J. H. Bradford and J. T. Carson, partners under the firm name and style of Bradford & Carson, bring this bill against R. J., B. W. and W. W. Montgomery, partners under the firm name and style of Montgomery Furniture Co., to recover upon a note made to complainants by the defendants on February 2, 1902, for \$3,000.

The defense made by answer and cross bill, is that the complainants have breached a contract and agreement made with the defendants in part consideration of the note sued on, and have thus destroyed the consideration of the note and injured and damaged defendants in the sum of \$10,000, for which they ask a decree.

The material facts found by the court of chancery appeals are these:

Complainants, who for some years have been engaged in the wholesale and retail furniture business in the city of Nashville, on February 2, 1902, sold their entire business consisting of furniture, fixtures and the good will of the firm to defendants, agreeing at the same time to remain out of the furniture business in Nashville for three years, from and after that time. The contract price of the merchandise and fixtures was \$28,537.01, and was paid at the time of the sale. The value of the good will of Bradford & Carson, and their contract not to again resume business in Nashville within three years was agreed to be \$3,000, and for this the note sued upon was

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made. Complaints delivered their stock, fixtures, and business to the defendants, ceased the furniture business, and complainant Bradford entered and remained in the employ of the defendants, assisting them in conducting their business, for some four months.

That on July 1, 1902, the Montgomery Furniture Company sold their entire business to the Montgomery Furniture & Manufacturing Company, a corporation which the defendants were instrumental in creating and organizing for the purpose of manufacturing furniture and dealing in it at wholesale and retail, in the city of Nashville. The defendants were the owners of \$30,000 of the capital stock of the corporation which was \$72,000, were its chief officers and had the management of its business. The corporation continued the furniture business in all respects as it had been conducted by the defendants, until January 1, 1904, when it resold this part of its business to the defendants who have carried it on from that time in all things as they did prior to their sale to the corporation.

That on January 1, 1903, the complainant, J. H. Bradford, in connection with his brother and son as partners, again engaged in the wholesale furniture business in Nashville, under the firm name of The Bradford Wholesale Furniture Co., in opposition to defendants, competing with them while stockholders of the Montgomery Furniture & Manufacturing Co., and later as partners under their old firm name and style of Montgomery Furniture Co.

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Upon these facts the court of chancery appeals held and adjudged that the complainants had breached their contracts not to engage in the furniture business in Nashville for three years, from and after their sale to the defendants, and that this breach constituted a good defense to any recovery upon the note sued on, and dismissed their bill with cost. That court made no finding upon the subject of damages which the defendants claim they sustained by complainants breach of their contract.

Complainants have appealed from this decree, and assigned errors. We will dispose of the several errors assigned as a whole.

The first contention of the complainants is that when the defendants sold their partnership business to the Montgomery Furniture & Manufacturing Co., they ceased to be in the furniture business, and complainants were free to again engage in it, and in doing so they were not in opposition to the defendants, and committed no breach of their contract. This contention is predicated upon the assumption that complainants contracted with the defendants as individuals only, and that when the defendants sold their business to the Montgomery Furniture & Manufacturing Co., they as individuals ceased to do business, and that that conducted by the Montgomery Furniture & Manufacturing Co. was a separate and distinct business carried on by another person, a stranger to their contract and in no way entitled to its benefits. They further say that the contract

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which they had made with the defendants was not assignable, and did not pass to the corporation with the sale of the business of the defendants, but was lost and destroyed by such sale. In support of this contention they cite and rely upon the case of *Bagby & Rivers Co. v. Rivers*, 87 Maryland, 400; 67 Am. St. R., 357. That case does go far towards supporting their position. It is there held that Bagby, who had purchased the good will of the firm of Bagby & Rivers, together with the right to continue the business in the old firm name from the retiring partner Rivers, with a contract upon the part of Rivers not to again engage in the same business, in the same place within a limited time, lost the benefit of the contract and released Rivers from his agreement when he assigned said contract to a corporation formed to continue the same business. We are, however, not satisfied with the reasoning of the court in that case, believing it to be too technical, and destructive of the spirit of the contract and the purpose and intention of the parties, and are unwilling to follow it. All contracts should be construed and interpreted, when it is possible to do so, in accordance with the intention of the parties, so as to effect the ends contemplated and contracted for by them. We think the complainants contracted with the defendants not to engage in the furniture business for three years in competition with them, regardless of whether they conducted their business as individuals, partners, or stockholders in a corporation. The thing contracted for was protection against competition from

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the complainants in order that the defendants might have the full benefit of the good will of the old business they had purchased. It was immaterial to the complainants in what name the defendants conducted their business; that was a matter in which they were not interested. Their contract was simply not to engage in a business which would by competition be injurious to, or compete with the capital, energy and ability which the defendants were investing in and devoting to the furniture business in Nashville. Complainants would probably have made the same contract for the same consideration, if defendants at the time had told them they intended to incorporate their business. The entire business of the defendants, including all they had purchased from the complainants, was made over to the corporation, and they became the owners of nearly one-half of the capital stock, and were its chief officers. They had the same money invested in the business of the corporation, and gave that business the same attention as they had previously their partnership business. The business of the corporation, to the extent they were interested in it, was their business and was as much protected by the contract of the complainants as it was while it was conducted in their own name. Certainly after January 1, 1904, when they withdrew from the corporation, their business was the same in all respects as it was when the contract was made with the complainants. We think to hold that the defendants lost the benefit of their contract by virtue of the vestiture of the title of

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their business in an artificial person in order, as they thought, to carry it on more advantageously, would be to allow the complainants while recovering full consideration to defeat the object of their contract and to do the defendants great injustice. Complainants contracted not to engage in the furniture business for the time mentioned in opposition to the defendants. The agreement was absolute and without qualification. The change made by the defendants in the manner of conducting their business, in no way affected complainants. It did not in any way increase or lessen the obligation and burdens of their contract, and we cannot see upon what principle, consistent with reason and justice, that it should release them from its performance.

The good will which defendants had purchased from complainants, and the contract they had made with them for its protection, were property rights, valuable and assignable, and were not affected by the changes made by the defendants in the manner in which they conducted their business; the contract remained in full force and effect until it expired by its own limitations.

These conclusions, we think, are well supported by reason and the weight of authority. In the case of *Kramer v. Old et al.*, 119 N. C., 1, 56 Am. St. Rep., 650, the defendants sold their milling business at Elizabeth City, North Carolina, to the complainant and agreed not to again engage in the same business at that place; afterwards, with others they organized a corporation in which they became stockholders to compete with the

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purchaser of their former business at Elizabeth City, and the complainant filed a bill to enjoin them from carrying on said business. The defendants insisted that as stockholders they were not violating the contract which they had made as individuals; that the corporation was a separate and distinct person and was not bound by any contract made by its stockholders. The court in granting the relief prayed said: "As a court of chancery appeals we must declare that where injunctive relief is asked, it is the duty of the court to restrain the contracting parties from violating the spirit, as well as the letter of the agreement. Under a fair and just interpretation of its terms the stipulation meant that the three defendants were not to engage in business so as to bring their skill, names, and influence to the aid of any competitor carrying on the same trade within the prohibited limits. It was therefore a violation of the contract on the part of the three mentioned, or either of them to take stock in, help to organize, or manage a corporation formed to compete with the plaintiff in his business.

"While the courts will not restrain a party bound by such a contract from selling or leasing his premises to others to engage in the business which he has agreed to abstain from carrying on or from selling to them the machinery or supplies needed in embarking in it, a different rule must prevail when it appears that the prohibited party attempts, not to sell outright to others, but to furnish the machinery or capital, or a portion of either,

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in lieu of stock in a corporation organized with a view to competition with the person protected by his contract against such injury.

"The three contracting defendants have presumably received the full value of the business sold and which is protected by their own agreement against their own competition, and equity will not allow them with the price in their pockets to evade their contract under the thin guise of becoming the chief stockholders in a company organized to do what they cannot lawfully do as individuals."

In the case of *Dunlop v. Gregory*, 10 N. Y., 241, 61 Am. Dec., 747, the defendants had contracted with the plaintiffs not to operate a steamboat upon certain waters, and had breached their contract. Plaintiffs sued for damages, and the defense was that the association of which the plaintiffs were members when the contract was made had been dissolved, and defendants were released from the obligation of their contract. The court in affirming a judgment for plaintiffs said: Because a part of the covenantees sold out their interest in the steamboats running on the Hudson river between the making of the agreement and its breach by the defendants, the remaining covenantees who retained their interest in such boats ought not to be deprived of their remedy on the agreement to recover the damages sustained by them by means of such breach. . . . The action can be sustained, if any one of the plaintiffs has a beneficial interest in the suit. The covenant inured

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to the benefit of the covenantees who retained their interest in the steamboats running on the river. The other covenantees who had sold out and therefore could not be injured by the breach of the agreement are merely nominal parties to the suit. The dissolution of the Hudson River Steamboat Association is no defense to the suit. The agreement was not made with the plaintiffs as members of the association, or as copartners, but as individuals, and was intended to protect their interest, whatever that might be, in the steamboats running between New York and Albany. The obligation of the agreement is not at an end, because the Steamboat Association has been dissolved, or because the partnership of which the plaintiffs were members at the time of the making of the agreement has expired by efflux of time."

And in *Beard v. Sinex*, 6 Ind., 200, 63 Am. Dec., 381, Dennis-Mumford & Hooper, partners engaged in the agricultural implement business in the city of Richmond, Indiana, purchased the stock of Beard & Sinex, then in the same business, and who contracted with Dennis-Mumford & Hooper not to again resume that business in Richmond. Afterwards Dennis bought out his partners and continued the business. Beard and Sinex took in an additional partner and resumed the agricultural implement business. Dennis filed his bill to enjoin them from doing so. It was held that he succeeded to all the rights of his partners under the contract they had made, and that the defendants by taking in an additional partner could not escape their contract, and the agreement

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they had made was enforced according to its spirit and the intention of the parties.

In the case of *Pemberton v. Vaughan*, 10 Adolphus & Ellis, 87, 59 Eng. Com. Law, 87, the facts were as follows: The defendant was in possession of a house in which he made and sold ginger beer. For a consideration he gave possession of the premises, and sold the good will of his business to the plaintiff, agreeing not to again enter the same business within one mile of said premises. There was a breach of this agreement and action brought for the damages sustained. Upon matters urged in defense the court said: "It does not follow that the plaintiff will not require the protection of the agreement because he may not himself continue in the business; he may sell the business and sell it on better terms on account of the protection secured by the agreement."

In the case of *Hitchcock v. Koker*, 6 Adolphus & Ellis, 98, 33 Eng. Com. Law, 438, which involved a similar question, the court in sustaining the action, held: "If therefore it is not unreasonable, as undoubtedly it is not, to prevent a servant from entering into the same trade in the same town in which his master lives, so long as the master carries on the trade there, we cannot think it unreasonable that the restraint should be carried further, and it should be allowed to continue if the master sells the trade or bequeaths it, or it becomes the property of his personal representative; that is, if it is reasonable that the master can by an agreement secure himself from a diminution of the annual profits or his trade, it does

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not appear to us unreasonable that these restrictions should go so far as to secure to the master the enjoyment of the price or value for which the trade would sell, or secure the enjoyment of the same trade to his purchaser, or legatee, or executor."

In the case of *Francisco v. Smith*, 143 N. Y., 488, is also in point. The facts were these: Francisco purchased the business of a baker in the town of Little Falls, N. Y., the seller contracting not to engage in a similar business in that town for five years. Francisco mortgaged the fixtures and other personal property used in the business, and made a default. The mortgage was foreclosed, the property purchased by the mortgagee, and the business suspended and closed for several months. Mrs. Francisco then repurchased the fixtures and other personal property and reopened the business in her own name, and purchased from her husband the contract which Smith had made with him. Smith opened a competing business, and she brought a bill to enjoin him from continuing it, and it was held: "It is unquestioned that the agreement entered into by the defendant not to engage in the bakery and confectionery business in Little Falls during the period of five years was legal and valid, and that courts of equity will enforce such agreements for the protection of the business to which they relate. Such an agreement is a valuable right in connection with the business it was designed to protect, and going with the business it may be assigned, and the assignee may enforce it, just as the assignor could

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have enforced it, if he had retained the business. (*Diamond Match Co. v. Roeber*, 106 N. Y., 473.) "The agreement can have no independent existence or vitality aside from the business. If Mr. Francisco had not disposed of the business, and had not himself carried it on, there would have been nothing for the agreement to operate upon; no grounds for equitable relief against a breach thereof, or for recovery in an action at law of anything except possibly nominal damages. He would not have lost the benefit of the agreement by omitting, for any definite time during the five years, to carry on the business. It may be assumed, and indeed it is conceded, that he retained the business until he made the assignment to the plaintiff, May 25, 1891. At that date there was nothing which prevented him from resuming and carrying on the business, and then having the full benefit of the defendant's agreement. But before that date the plaintiff had purchased the property, tools and fixtures connected with the business, and was in possession of the place where the business had been carried on by the defendant and subsequently by her husband. At that date he assigned to her the business and the good will thereof, and all his rights under the defendant's agreement. Mr. Francisco having the conceded right to sell all the property and the business together, and to assign the agreement at the same time, what is there in reason or principle that precludes him from first disposing of the property and place of business, and afterward selling and assigning to the same

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person the business and the good will thereof, together with the agreement made for the protection of the business? We can perceive nothing. The assignment of the agreement goes with and is connected with the business as much in the one case as in the other."

In the case of *Upriver Ice Co. v. Denler*, 114 Mich., 297, the defendant sold one hundred and forty shares of the capital stock of the complainant, a corporation, to Bennett and contracted with him not to again engage in the ice business in Port Huron or near there, either as principal, agent, or employee. Bennett assigned this contract to Hayes, and he to the complainant. Denler purchased the Crystal Ice Co., and resumed the ice business in Port Huron. The complainant brought a bill to restrain him from continuing the business in violation of the contract which it held as assignee of Bennett. The defense was that the contract was personal in its nature and enforceable only by the person in whose interest it was made. The court granted complainant full relief saying: "But it is said that the complainant could take no interest in the contract as assignee. We have proceeded upon the assumption that the contract was made in the interest of the company, and was supported by some consideration. But even if this were not the fact, yet the written contract made with Bennett came to the company by assignment; and we think the complainant acquired all the rights of Bennett by the assignment. That very question was considered in *Jacoby v. Whit-*

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more, 49 Law T. (N. S.), 335. The original contract was made between Whitmore and one Martin Cheek. Thereafter Cheek assigned to plaintiff all his beneficial interest and good will in the business, and it was held that plaintiff took by this assignment all the rights and interest which Cheek held under the contract. In the present case the complainant company was directly interested in protecting itself from the competition of Denler. The company was composed of the two, O'Neil and Hayes. Hayes had taken an assignment of the Denler contract and turned such rights over to the company by assignment, and we are of the opinion that the company had the right to enforce the contract."

It is therefore clear, we think, that the contract of the complainant not to engage in the furniture business in Nashville for three years from and after February 1, 1902, was not annulled or forfeited by any of the facts relied upon, and that they breached it when Bradford with others entered that business before the expiration of the time contracted for, both while the defendants were stockholders in the Montgomery Furniture & Manufacturing Co., and afterwards when they resumed business as partners.

The court of chancery appeals, as stated, was of the opinion that this breach was a complete defense to the recovery sought upon the note of defendants and dismissed complainants' bill. Complainants insist that granting the breach of their contract, as herein held, the effect is not necessarily to defeat their action, but that

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the relief which the defendants were entitled to was either to enjoin them from again entering into business in violation of their contract, or an action to recover such damages as naturally and proximately followed such breach which might be recouped in this case, or recovered in a separate action at the election of the defendants. The determination of these questions depend upon whether the contract made between the parties was an entirety or not. If it was an entire contract supported by one consideration, or the agreement upon the part of the complainants to cease the furniture business in Nashville for three years was a condition precedent, there can be no doubt but what the decree of the court of chancery appeals is correct, and that the complainants' bill should be dismissed. In the case of *Coleman v. Hudson*, 34 Tenn., 465, Judge McKinney speaking for the court says: "The distinction between an entire and severable contract is clearly stated in the books. In the former the consideration is entire on both sides. It does not either by its terms or the implied intention of the parties contemplate or admit of apportionment upon a partial failure on either side; and the complete fulfillment of the contract by either is required as a condition precedent to the fulfillment of any part of the contract by the other. A severable contract is a contract, the consideration of which by its terms is susceptible of division and apportionment. There is in such contract no entirety of consideration on either side constituting a condition of the agreement;

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and neither party can claim more than an equivalent for the actual consideration on his part. Story on Con., secs. 21 and 22.

"An entire contract in its legal interpretation is an unconditional agreement for the whole of the several articles, or number or quantity of goods contracted for; and precludes by its terms, and equally by the plain intention of the parties, all idea of divisibility. A severable contract, on the other hand, in its terms implies an apportionment.

"There is another class of cases noticed in some of the books of a mixed nature partaking of the character both of entire and severable contracts, and which may be considered as entire or severable according to the circumstances of the particular cases."

In Page on Contracts, sec. 1453, it is said: The question whether a covenant is independent or dependent, turns entirely upon the intention of the parties as shown in the entire contract, and the tests hereinafter suggested, while of great help, cannot be conclusive in every case. The question whether covenants are dependent or independent must be determined in each case upon the proper construction to be placed upon the language employed by the parties to express their agreement. If parties think proper they may agree that the right of one to maintain an action against another shall be conditional or dependent upon the plaintiff's performance of covenants entered into on his part. On the other hand, they may agree that the performance by

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one should be a condition precedent to performance by the other. The question in each case is, which intent is disclosed by the language employed in the contract. It is said where the acts stipulated to be done are to be done at different times, the stipulations are to be construed as independent of each other. This, as a general rule, is correct, but it is subject to the intention of the parties as signified in the language of the contract. The great rule is to ascertain the intent of the parties from the language used."

Applying the principles here announced, we think that the contract in question was not entire, but severable, and that this clearly appears from its terms and the circumstances surrounding its execution.

The consideration of the note of the defendants was twofold; the good will of the firm of Bradford & Carson and their contract not to engage in the furniture business in Nashville for three years from the time of their sale to the defendants. These are separate and distinct considerations.

The good will of a firm is a species property, often very valuable and it may be sold and transferred. It is defined by Judge Story as follows: "This good will may be properly enough described to be the advantage or benefit which is acquired by an establishment beyond the mere value of the capital, stock, funds, or property employed therein, in consequence of the general public patronage and encouragement which it received from constant and habitual customers, on account of its local

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position or common celebrity or reputation for skill, or affluence or punctuality, or from other accidental circumstances or necessities, or even from ancient partiality or prejudices." Story on Part., sec. 99.

A contract or agreement upon the part of the vendor of the good will not to resume the same business in the same locality, while adding greatly to it when sold, is no part of the good will and is not implied from a sale of it. It is the subject of a separate and distinct contract and in the absence of an express agreement of that kind the vendor is at liberty to resume his former business at his pleasure. This seems to be well settled. *Jackson v. Byrnes*, 103 Tenn., 700; *Howard v. Taylor*, 90 Ala., 243; Page on Con., sec. 374.

There can be no question but that the defendants acquired the good will of Bradford & Carson, and that it was delivered to them at the time of their purchase. There was certainly no failure of this part of the consideration of the note. The entire business of Bradford & Carson was turned over to the defendants, and Bradford the active partner, worked for them on a salary for several months. Performance of this part of the contract, it is clear, was not dependent upon any of the other parts of it as it was done immediately while the execution of all the other parts was deferred. The contract of complainants not to again engage in the furniture business while the performance of it was begun immediately, could not be completed until the expiration of the three years from its date. This contract upon the part of the

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defendants to pay \$3,000 as a consideration for the good will which had been delivered to them, and for the agreement on the part of complainants to cease business for three years, was to be performed in one year from its date. One year from the reception of part of the consideration, and two years before complainants could complete the other part of the consideration. It is clear, therefore, that it could not have been the intention of the parties that the performance of this contract by either party was conditioned upon its performance by the other. The terms of the contract render such an intention absolutely impossible of execution. We think therefore it is clear that the contract between the parties is severable, and that the breach by the complainants of that part of the argument binding them not to resume business for three years cannot defeat their action upon the note of the defendants. It would be unjust to so hold since the defendants have received by far the larger part of the consideration of their note, the good will of the firm of Bradford & Carson, and the performance of their contract to cease business for nearly one-third of the time agreed upon, which was certainly the most advantageous part of it to the defendants in enabling them to secure and hold the business of that firm.

We are of the opinion that the defendants are entitled to maintain their cross bill to recover from the complainants such damages as they sustained from the breach of complainants' contract not to re-enter the fur-

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niture business in Nashville within three years, which are the natural and proximate results of such breach, to be set off against the decree upon their note, in part or whole, and if the same be in excess of such decree, to have a judgment therefor in this case.

Contracts of this character, when they, like the one under consideration, are reasonable and go no further than affording a fair protection to the good will purchased, do not interfere with the general interests of the public, and are not in restraint of trade, but valid and enforceable. *Jackson v. Byrnes*, 103 Tenn., 699; *Musc v. Swayne*, 70 Tenn., 251; *Anchor Electric Co. v. Hanks*, 171 Mich., 70; *Mell v. Mooney*, 30 Ga., 413; *Lufborough v. Henderson*, 30 Ga., 482; *Herbert v. Ford*, 29 Maine, 546; *Warfield v. Boone*, 33 Md., 63; *Sedgwick on Damages*, sec. 1062; *Page on Contracts*, sec. 375.

The chief difficulty found in actions for breaches of contracts of this character is in ascertaining the damages which the plaintiff can recover, as they are generally uncertain, remote, and speculative. For this reason the most efficient remedy is an injunction inhibiting the defendant from again entering into the business he has contracted not to resume. The jurisdiction of courts of equity to grant this relief is well established. *Jackson v. Byrnes*, 103 Tenn., 699.

The right of the plaintiff to maintain an action at law upon a contract not to compete in business is equally well established, and the plaintiff has his election as to which remedy he will pursue, but when he elects to sue

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for damages, he must be prepared to prove such damages as the law recognizes, or otherwise he can only recover nominal damages. The true measure of damages for a breach of contract of this sort is the injury the plaintiff has sustained. If he has sustained no damages which are the natural and proximate results of the breach, he has sustained no injury, and can only recover nominal damages. The measure of damages in a case of this character is well and fully stated in the case of *Howard v. Taylor*, 90 Ala., 242, cited with approval by this court in *Jackson v. Byrnes*, supra.

The facts of that case were as follows:

Howard sold to Taylor his bar and fixtures in the town of Decatur, with an unexpired lease upon the premises where he did business, and the good will of the concern for the aggregate price of \$1,400, and promised and agreed that he would not carry on the same business at any other place in that town, but would remove his stock of goods and business to another county. This contract was breached by his resuming business in Decatur, and the action was to recover damages accruing to the plaintiff from such breach. The trial judge charged that the measure of damages was the difference between the value of the property sold and the aggregate price paid to the defendant. In reversing the judgment in favor of the plaintiff, Clopton, Judge, speaking for the court, said: "The question arises, does the charge upon the facts stated, and in view of the character of the stipulation and its connection with the good will,

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assert the correct measure of recovery? In other words, is the compensation for the injury sustained by the breach of such promise arbitrarily measured by the excess of the gross amount paid over the value of the other property, without regard to the extent of the actual injury suffered? In an action founded on the breach of a contract, the general rule is that the plaintiff can only recover the natural and proximate damages caused by the breach complained of. Under this rule, the right of the plaintiff is to recover compensation for the injury he has sustained by the violation of the promise not to engage in the same business. The difficulty of proving the damages from the breach of such promise, arising from its nature, may be conceded. The uncertainty and difficulty of proving the resulting damages does not except the case from the operation of the general rule, and, in the absence of proof, positive or circumstantial, of injury, the plaintiff is entitled to recover only nominal damages. *Terry v. Eslava*, 1 Port., 273. The loss of profits, if there are data from which the amount may be ascertained with reasonable certainty; the diminution in value of the property sold, and the cost of the licenses for the unexpired term, all may be regarded as elements of the damages, which go to make up the measure of recovery. *Burkhardt v. Burkhardt*, 47 Ohio St., 474; *Mitchell v. Read*, 84 N. Y., 556; *Mellesch v. Keen*, 28 Beav., 453; *Rawson v. Pratt*, 91 Ind., 9.

"In such action, the plaintiff must not only show a right of recovery, but also the facts or elements which

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compose the measure of recovery, unless the criterion by which the damage may be ascertained is provided by the contract, or by the law operating on the contract. Without proof of actual injury and its extent—from the mere fact that the defendant engaged in the same business in Decatur—the instruction assumed that plaintiff suffered damages to the extent of the difference between the gross price paid and the value of the property other than the good will. Though a promise not to engage in the same business imparts value to the good will, for the reason that it affords a protection to the business of the purchaser, not obtainable by the good will *simpliciter*, there is no distinction in the character and extent of the damage produced by a breach of such promise. In either case, engaging in rival business, and inducing the old customers of the seller and the public to deal with him, is the main source and cause of injury. The value and enjoyment of the good will are depreciated and interrupted by reason of the proximate damage to the business of the purchaser caused thereby. The plaintiff received the fixtures, and exercised the right to lease and occupy the house, and in so doing received the good will, so far as it pertains to, and is the incident of, the place of business—the advantage of patronage on account of its local position. Under these circumstances, a violation of the promise not to engage in the same business does not necessarily work the total destruction of the good will, nor deprive plaintiff wholly of its enjoyment and benefits. The rule as to the meas-

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ure of damages, when there is the breach of a contract for the sale of specific chattels by a failure to deliver a part of them, is inapplicable. When the plaintiff elected his action on the contract for the recovery of the damages consequent on its breach, he took upon himself the burden of proving the extent of the injury. Merely showing a breach establishes the right of plaintiff to damages, but, in the absence of proof of the extent of the injury, he is entitled to recover only nominal damages.

"The charge given at the instance of the plaintiff is equally, if not more, objectionable. On the same hypothesis, substantially, as the charge just considered, and without any proof of actual damage, it authorized the jury to render a verdict, using its own language, for whatever amount you may think the plaintiff is damaged, not exceeding the amount claimed in plaintiff's complaint, and after deducting four hundred and fifty dollars admitted by plaintiff to have been received by him. The damages claimed in the complaint were \$2,000 and the amount of the deduction was the proved value of the fixtures. Under the rule settled by our decisions, in an action *ex contractu* of this character, neither remote, consequential nor exemplary damages are recoverable. The plaintiff is entitled to just compensation for the actual injuries, which are the natural and proximate consequences of the wrong complained of; and such com-

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pensation must not be left to a capricious or speculative decision, but awarded on established principles."

This case was again before the supreme court of Alabama (110 Ala., 473), upon the appeal of the plaintiff, Taylor, and that court in passing upon the same question said: "His (Taylor's) only real ground of complaint consists in Howard engaging in a competitive business in violation of his contract; for this breach he was entitled to recover such actual damages as he could show naturally and proximately resulted therefrom. Failing to furnish data from which the jury could properly estimate the actual damages, he could recover only a nominal sum.

"The difficulty of making proof from which the damages may be accurately computed, and the injustice of allowing the defendant to retain the full amount he received while violating his agreement with apparent impunity, furnish a sufficient reason why the plaintiff might have sought injunctive relief in a court of equity and obtained the specific performance of the contract; but these circumstances do not justify us in relieving the plaintiff of the burden of the action he elected to bring, nor in declaring for his benefit a measure of damages not based upon sound principles of law." *Taylor v. Howard*, 110 Ala., 470.

The principles announced by the supreme court of Alabama in these cases apply to the rights of the parties in this case, and will be followed by the chancellor in ascertaining the damages resulting to the cross com-

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plainants from the breach of contract of Bradford & Carson not to again enter the furniture business in Nashville within the time they contracted not to do so.

This case will be remanded to the chancery court, where the damages sued for by cross complainants in their cross bill, as shown by the averments thereof, will be ascertained and set off, in whole or in part, as the proof may warrant, against the decree in favor of complainants, and if such damages exceed the amount of said decree, cross complainants will recover the same from the defendants to the cross bill.

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W. T. HARDISON & CO. v. JAMES H. YEAMAN *et al.*

and

E. T. MURRAY & CO. v. JAMES H. YEAMAN *et al.*

(*Nashville*. December Term, 1905).

1. **PUBLIC WORKS.** Contractor's bond to furnish materials and labor is not equivalent to statutory bond to pay for materials and labor used in the contract.

The bond of a contractor employed to build a courthouse for a county conditioned to provide and furnish the labor and materials of every description necessary to complete such courthouse is not equivalent to the statutory bond whose condition is required to be to the effect that the contractor will pay for all the materials and labor used in the contract for the construction of the public work. (*Post*, pp. 645, 648.)

Acts cited and construed: 1899, ch. 182.

2. **SAME.** Bond of contractor of public works expressly providing for no liability except to the owner cannot be sued on by materialmen and laborers.

An action for materials furnished and labor done will not lie on the bond of a contractor to construct public works, as a courthouse for a county, where the bond expressly provides that the surety shall not be liable thereunder to any one except the owner; for such a bond is not the statutory bond upon which such actions will lie. (*Post*, pp. 647, 649.)

Acts cited and construed: 1899, ch. 182.

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3. **SAME.** Same. Same. Surety on statutory bond of contractor for public works cannot be relieved from liability to furnishers of materials and labor by acts of the owner; otherwise, when.

Under a statutory bond of a contractor to construct public works, no act of the owner can relieve the surety from liability to the furnisher of materials and labor, while under the bond as shown in the first and second headnotes, any breach by the owener absolves the surety from all liability. (*Post*, p. 649.)

4. **SAME.** Same. Same. Same. No mechanic's lien on public buildings, and bond of contractor providing against liens will not give action to materialmen and laborers.

An action for materials furnished and labor done will not lie on the bond of a contractor to construct public works, as a courthouse for a county, where the bond expressly provides that the surety shall not be liable thereunder to any one except the owner, although it further provides that the owner, in estimating his damages, may include the claim of mechanics and materialmen arising out of the performance of said contract, and paid by him, only when the same are valid liens against his property, since there is no mechanic's lien on public buildings. (*Post*, pp. 647, 649, 651-654.)

Cases cited and approved: *Electric Co. v. U. S. F. & G. Co.*, 110 Wis., 434; *Sterling v. Wolf*, 163 Ill., 467; *Bank v. Masons*, 98 U. S., 123; *Parker v. Jeffery*, 26 Or., 186; *Merrill v. Green*, 55 N. Y., 270; *Sayward v. Dexter*, 19 C. C. A., 176; *Price v. Doyle*, 34 Minn., 400.

5. **SAME.** Liability of officers for failure to take bond of contractor is not escaped by failure to give notice of claims to be protected by such bond.

Where public officers let a contract for the construction of public works, as a courthouse for a county, without requiring a bond of the contractor to pay for all materials and labor used therein, they are individually liable to the laborers and materialmen for the labor done and the materials furnished and

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used in the contract; and such liability is not escaped by the failure of the claimants to give notice of their claims within thirty days after the completion of the work, because the statutory provision as to notice is applicable only where the prescribed bond is given, and not where liability is incurred by failure to require such bond. (*Post*, pp. 646, 647, 654, 655, 657.)

Acts cited and construed: 1899, ch. 182.

Cases cited and approved: *Rhea Co. v. Sneed*, 105 Tenn., 581; *Templeton v. Nipper*, 107 Tenn., 548.

6. **SAME.** Building committee let the contract, though made subject to ratification by county court, and ratified by such court, and are liable for failure to take contractor's bond for protection of materialmen and laborers.

The members of a building committee appointed by a county court to contract for the erection of a courthouse are the parties who let the contract within the sense of the statute (Acts 1899, ch. 182), where they enter into a contract for such building subject to ratification by the county court, and the ratification is made, with directions to such committee to have the same carried out, so that they are individually liable for failure to take the contractor's bond to pay for materials furnished and labor done, as required by statute. (*Post*, pp. 655-657.)

Acts cited and construed: 1899, ch. 182.

7. **SAME.** Members of a building committee appointed for erection of a courthouse are public officers, and are liable as such for failure to take contractor's bond, when.

The members of a building committee appointed by a county court to contract for the erection of a courthouse are public officers, and incur the liability for the failure to exact and take the statutory bond of the contractor to pay for the materials and labor used in the contract. (*Post*, p. 657.)

Acts cited and construed: 1899, ch. 182.

Cases cited and approved: *Rhea Co. v. Sneed*, 105 Tenn., 581; *Templeton v. Nipper*, 107 Tenn., 548.

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8. **SAME.** Reserve payments applied to completion of building, for default of contractor regardless of prior creditors for materials and labor, when.

Where the contract for the erection of a courthouse for a county provided that certain deferred payments or reserve fund arising under the contract should be applied to the completion of the building in case of the default of the contractor, and the contractor's bond to the county made the same provision on behalf of the surety, the furnishers of labor and materials, who in no way impounded such deferred payments or reserve fund, are not entitled to recover of the surety on the bond or the building committee, because by agreement between the contractor, the county through said committee, and the said surety, the deferred payments or reserve fund was applied to the completion of the building, and not to the payment of their claims. (*Post*, pp. 657-661.)

9. **SAME.** No implied contract by county to pay materialmen and laborers of its contractor to build courthouse, when.

There is no implied contract on the part of a county to pay for the materials and labor used by its contractor in the erection of a courthouse for a stipulated sum, where the materials are purchased and the laborers are employed by such contractor, without paying for the same. (*Post*, pp. 652, 653, 660, 661.)

Cases cited and approved: *Rhea Co. v. Sneed*, 105 Tenn., 581
Templeton v. Nipper, 107 Tenn., 548.

10. **SAME.** Materialmen and laborers can assert no claim against a fund due the contractor previously subjected by garnishment by other creditors, when.

Where, after the completion of a courthouse, there remains a fund due to the contractor, which is subjected by garnishment by a creditor of the contractor to the payment of his debt, materialmen and laborers, without having impounded the fund, are not entitled to subsequently assert any interest therein. (*Post*, pp. 661, 662.)

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11. SURETIES. Not bound beyond the limits of their engagements.

It is axiomatic and fundamental that the obligation of a surety is *strictissimi juris*, and cannot be extended beyond the limits of his engagement. (*Post*, pp. 649-651, 653, 654.)

Code cited and construed: Sec. 4894 (S.); sec. 3879 (M. & V.); sec. 3162 (T. & S. and 1858).

Cases cited and approved: *Nichol v. McCombs*, 2 Yer., 83; *Triplet v. Gray*, 7 Yer., 16; *Kincannon v. Carroll*, 9 Yer., 14; *Maxwell v. Salts*, 4 Cold., 233; *Cross v. Scarboro*, 6 Bax., 136; *Mason v. Harris*, 11 Lea, 69; *State v. Polk*, 14 Lea, 6; *Brunswick v. Harvey*, 114 Ga., 733; *Kingsbury v. Westfall*, 61 N. Y., 356; *Lang v. Pike*, 27 Ohio St., 498; *Sterling v. Wolf*, 163 Ill. 467.

FROM DAVIDSON.

APPEAL from the Chancery Court of Davidson County.
—JOHN ALLISON, Chancellor.

PARKS & BELL, for Hardison & Co.

JNO. L. NOLEN, for Murray & Co.

B. A. BUTLER, for J. T. Anderson *et al.*, the Building Committee.

P. D. MADDIN, for Fidelity & Deposit Co.

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MR. JUSTICE M'ALISTER delivered the opinion of the Court.

The litigation in this cause grew out of the building of a courthouse for the county of Jackson, at Gainesboro. The building was constructed under the supervision of a building committee, composed of J. T. Anderson, M. L. Gore, B. J. Franklin, W. F. Saddler, and W. W. Draper, appointed by the county court for said purpose. The contract was awarded to James H. Yeaman, of Nashville, and in the progress of the work Yeaman employed plaintiffs E. T. Murray & Co., to furnish the material and to put on the roof, that amounted to \$1,725.10, which the contractor failed to pay. Yeaman also purchased certain materials from W. T. Hardison & Co., and became indebted to them in a balance of \$353.70. The contractor, Yeaman, entered into a bond in the sum of \$10,000, with the Fidelity & Deposit Company of Maryland as surety, conditioned for the faithful performance of the work. The complainants, W. T. Hardison & Co. and E. T. Murray & Co., have brought the present bills, which were consolidated and heard together in the court below, against the building committee, and also against the Fidelity & Deposit Company, to recover balances alleged to be due them for work performed and materials furnished the contractor in the course of the building.

The chancellor pronounced a decree in favor of the complainants against all of the defendants for the full amount of their respective claims. On appeal, the court

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of chancery appeals reversed the decree of the chancellor as to the Fidelity & Deposit Company, but affirmed the decree against the building committee. Complainants, E. T. Murray & Co., and W. T. Hardison & Co., appealed to this court from so much of the decree of the court of chancery appeals as adjudges the defendant Fidelity & Deposit Company not liable. The defendants J. T. Anderson, M. L. Gore, B. J. Franklin, W. F. Saddle, and W. W. Draper appealed from the entire decree.

It appears that the building committee entered into a written contract with the defendant J. H. Yeaman on January 6, 1903, to furnish the materials and build said courthouse, and that on March 20, 1903, the said Yeaman executed to the said committee a bond, with the defendant the Fidelity & Deposit Company of Maryland as security, conditioned that the said Yeaman should faithfully perform and discharge all the terms, covenants, conditions, specifications, and stipulations in said contract. The liability of the defendants was made to turn largely upon the question whether the bond executed was in compliance with chapter 182, p. 358, Acts 1899, as follows:

“Section 1. That hereafter no contract shall be let for any public work in this State by any city, county or State authority, until the contractor shall first execute a good and solvent bond to the effect that he will pay for all the materials and labor used in said contract in lawful money of the United States.

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"Sec. 2. That any laborer or furnisher of material may bring an action on such bond, and make recovery in his own name, upon giving security or taking the oath prescribed for poor persons as provided by law, and in the event of such suit, the city, county or State, shall not be liable for any costs accruing thereunder.

"Sec. 3. That if any public officer whose duty it is to let or award contracts shall let or award any contract without requiring bond for the payment of labor and material, in compliance with the provisions of section 1 hereof, such officer shall be guilty of a misdemeanor.

"Sec. 4. That the laborer or furnisher of materials, to secure advantage of this act, shall file with the public officer who has charge of the letting of any contract, an itemized statement of the amount owed by the contractor for materials and labor used, within thirty days after the contract is completed."

The court of chancery appeals was of opinion that the Fidelity & Deposit Company were not liable to complainants because the bond was not executed as required by chapter 182, p. 358, Acts 1899, but that the members of said building committee were individually liable for a breach of official duty in not taking a bond as required by said act.

The court of chancery appeals, in adjudging liability against the members of the building committee, based its decree on the case of *Rhea County v. Sneed*, 105 Tenn., 581, 58 S. W., 1063, where it was held that "a public bridge is a public work within the meaning of the act

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of 1899 forbidding the letting of any public work for city, county, or State until the contractor shall first execute a good and solvent bond to the effect that he will pay for all materials and labor used in said contract," and county bridge commissioners letting such bridge without executing such bond are not only indictable under said act, but liable in a civil action for any damage resulting to laborers and materialmen, who would have been protected by the prescribed bond, if executed. *Templeton v. Nipper*, 107 Tenn., 548, 64 S. W., 889.

We shall first notice the following assignments of error on behalf of the building committee to the decree of the court of chancery appeals.

"(3) The court of chancery appeals erred in dismissing complainant's bill in so far as it sought a recovery against the Fidelity & Deposit Company, surety on the bond of Jas. H. Yeaman, the contractor.

"(4) The court of chancery appeals erred in holding that the bond given by Jas. H. Yeaman with the Fidelity & Deposit Company was only a common-law bond, and was not given in accordance with and in pursuance of the act of 1899.

"(5) The court of chancery appeals erred in holding that the complainants could not sue on the bond given by Jas. H. Yeaman, with the Fidelity & Deposit Company as surety, dated March 20, 1903, in their own names, and enforce collection of their demands against said surety."

In comparing the stipulations of the bond herein ex-

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ecuted by the Fidelity & Deposit Company with the requirements of the act of 1899, the following prominent differential features will be noticed: It may be remarked in the first place that the court of chancery appeals finds as a fact that none of the parties to this litigation had ever heard of Acts 1899, p. 359, c. 182, until after the materials were furnished, and, of course, in executing the bond herein, did not have said act in contemplation. It is, nevertheless, strenuously insisted on behalf of the building committee that said bond is in conformity with the requirements of said act.

An analysis of the statute will show:

(1) That it requires the execution of a bond wherein the contractor obligates himself to pay for all material and labor used in said contract. No such stipulation is contained in this bond. It has been suggested, however, by counsel for appellant, that this requirement is satisfied by the stipulation by the contractor in his original contract, and also in his bond "to provide good, proper, and efficient materials of all kinds whatsoever for the proper and efficient finishing and completing of all work arising under the contract, and to furnish all materials, labor, etc., of every description." It is very plain that this language does not bind the contractor to pay materialmen and laborers for the material furnished and work done by them, but is simply a stipulation that the contractor will furnish all material and labor necessary in the construction of the building without cost to the owner.

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(2) A right of action on such bond is expressly given any laborer or furnisher of material who may sue and make a recovery in his own name, while the bond actually executed by the Fidelity & Deposit Company expressly provides "that it shall not be liable under this bond to anyone except the owner."

(4) It is also true, as suggested by counsel, that under the statutory bond no act of the owner could relieve the surety from liability to the furnisher, while under the present bond any breach by the owner of the thing stipulated to be done by him would absolve the surety from all liability.

There are probably other omissions in this bond which are required by the act of 1899, but it will not be necessary to further trace the points of divergence between the bond actually executed and the statutory bond. It suffices to say that the bond executed herein by the Fidelity & Deposit Company does not embody any of the main requirements of the act of 1899, and cannot, by the most latitudinarian construction, be held to have been executed in pursuance of the provisions of that act.

It is axiomatic and fundamental that the obligation of a surety is *strictissimi juris*, and cannot be extended beyond the limits of his engagement. *Cross v. Scarboro*, 6 Baxt., 136. It has been held that, where a city takes the usual form of fidelity bond from a surety company in the place of the form of official bond prescribed by statute, the statute cannot be read into it, and the State must abide by the terms and limitations of the bond as

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given. *Mayor of Brunswick v. Harvey*, 114 Ga., 733, 40 S. E., 754.

In *Kingsbury v. Westfall*, 61 N. Y., 356, the court said: "It is now too well settled to admit of doubt that a guarantor, like a surety, is bound only by the strict letter or precise terms of the contract of his principal, whose performance of it he has guaranteed, that he is in this respect a favorite of the law, and that a claim against him is *strictissimi juris*."

In *Lang v. Pike*, 27 Ohio St., 498, the court said: "No covenants that do not appear in the face of the bond can be employed as against the sureties thereon. . . . No principle is more firmly settled in this State than this: That sureties may stand on the very terms of a statutory bond or undertaking. So clearly has this doctrine been announced and acted upon that it may be regarded as entering into the condition of such an undertaking that it will not be extended by the court beyond the necessary import of the words used. It will not be implied that the surety has undertaken to do more or other than that which is expressed in such obligation."

In *State v. M. T. Polk et al.*, 14 Lea, 6, it was stated that the bond which the statute requires the treasurer of the state to give is a joint and several bond, each obligor becoming bound for the entire penalty; but if the treasurer execute the bond, which is accepted, binding each of the sureties for only an aliquot part of the penalty, the sureties cannot be held liable beyond the terms of the contract. In the midst of the opinion, Judge Cooper said

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that "upon common principles, it is clear that the surety cannot be held bound beyond the terms of the bond, for the obvious reason that persons can only be held liable by the contract which they have actually entered into." *Nichol v. McCombs*, 2 Yerg., 83; *Triplet v. Gray*, 7 Yerg., 16; *Kincannon v. Carroll*, 9 Yerg., 14, 30 Am. Dec., 391; *Maxwell & Mulligan v. Salts*, 4 Cold., 233; *Mason v. Harris*, 11 Lea, 69.

In this last case, there was a judgment on a promissory note. On appeal by the defendant who executed bond for damages and costs only, and not for the debt, the court said: "By Code, sec. 3162, in actions founded on promissory notes where defendant appeals, the bond must be for the debt, interest, and costs. The bond in this case was for the costs and damages only, and is not as the statute required; but it has long been the settled law of this State that, where a bond given for the prosecution of a suit on appeal or a certiorari does not contain all conditions required, it will be good so far as it goes. If the case be proceeded with on behalf of the bond, a judgment may be rendered against the principal and surety to the extent of the bond, and against the principal alone for the residue. If, therefore, the bond be only for damages and costs when it should have been for the debt alone, the judgment against the surety can only be for damages and costs."

The next inquiry is whether the complainants are entitled to maintain an action against the Fidelity & Deposit Company. An examination of this bond will

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clearly disclose that it was not executed in any sense for the security of the laborer or materialmen, but was exclusively for the benefit of the owners of the property against any default on the part of the contractor. There is no stipulation in the bond nor in the contract that the contractor will pay the materialmen for the material furnished, or the laborers for work done during the progress of the work. The bond expressly provides that "the surety shall not be liable under this bond to any one except the owner; but it is agreed that the owner in estimating his damages may include the claim of mechanics and materialmen arising out of the performance of said contract, and paid by him only when the same, by the statutes of the State where the contract is performed, are valid liens against his property." But it must be conceded that the claims of complainants for work done and material furnished are in no sense liens on the property, since there is no mechanic's lien on public buildings, and the county of Jackson is not made a party defendant in this cause for the assertion of any supposed lien.

It has moreover, been held that the law implies no contract on the part of a county to pay laborers employed in the construction of a public work, where the contract for the building has been let at a stipulated price, and the company and its subcontractors employ such laborers. *Rhea County v. Sneed*, *supra*.

Moreover, it is shown that the building was completed and that Jackson county sustained no loss, and hence

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there is no ground for a recovery by complainants on the theory of the loss sustained by the county. Now, as already stated, the materialmen and laborers were not provided for in this bond, and clearly have no right of action against the sureties. *Electric Co. v. U. S. F. & G. Co.*, 110 Wis., 434, 85 N. W., 648, 53 L. R. A., 609; *City of Sterling v. Wolf*, 163 Ill., 467, 45 N. E., 218. In this last case it appeared that a sewer builder made a proposal to the city to build certain sewers and "to furnish such surety for the faithful performance of such contract, the payment of materials contracted for as may be approved by the city council." A contract was entered into by which he agreed to do the work for a certain price, "to furnish all labor, materials and tools necessary to execute the entire work," and his proposal was expressly made a part of the contract. It was held that the defendants, who were sureties upon his bond "conditioned for the faithful performance of his contract," were not liable for his non-payment of one who furnished the brick. The court said: "The rule has been reannounced by the court in almost numberless cases that the undertaking of a surety is strictly considered, and may not be extended by implication or construction; that he cannot be held beyond the express terms of his undertaking. The law is *stricti juris*. In case of doubt, the doubt is generally resolved in his favor. To hold that it was intended by the parties that the sureties for Real were to become responsible to third parties for all of the material, labor, and tools employed by him in the

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performance of his contract with the State would be to hold the sureties liable not only beyond the letter of their contract, but make them liable by the most liberal, and we think unjustifiable, construction of their contract."

Hence there is no privity of contract between the Fidelity & Deposit Company and the complainants who furnished material to the principal contractor which would authorize the maintenance of a suit against the surety. *Nat. Bank v. Grand Lodge Masons*, 98 U. S., 123, 25 L. Ed., 75; *Parker v. Jeffery*, 26 Or., 186, 37 Pac., 712; *Merrill v. Green*, 55 N. Y., 270; *Sayward v. Dexter*, *Horton & Co.*, 72 Fed., 765, 19 C. C. A., 176; *Price v. Doyle*, 34 Minn., 400, 26 N. W., 14.

The seventh, eighth, ninth, tenth, and eleventh assignments of error on behalf of the building committee proceed upon the idea that complainants, as materialmen, had not given the proper notice as required by section 4 of the act of 1899. As already quoted, the fourth section of that act provides "that the laborer or furnisher of materials, to secure the advantage of this act, shall file with the proper officer who has charge of the letting of any contract, an itemized statement of the amount owed by the contractor for materials and labor used, within thirty days after the contract is completed."

But these assignments of error all proceed upon the idea that chapter 182, p. 358, of the Acts of 1899, is applicable in determining the rights of the parties to this litigation; but, since we have held that the bond ex-

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ecuted by the Fidelity & Deposit Company in this case was not made in pursuance of the act of 1899, the provisions of that act on the subject of notice are likewise inapplicable to this case, so that these assignments of error for this reason must be overruled.

The twelfth assignment is that the court of chancery appeals erred in not holding that the defendants J. T. Anderson, M. L. Gore, W. F. Saddler, W. W. Draper, and B. J. Franklin, constituting the building committee, can in no event be held liable in this case, since they are not the owners of the building, and were not the parties required to take the bond as prescribed by the act of 1899.

In support of this assignment of error it is urged on behalf of the building committee that as a matter of fact the contract with Jas. H. Yeaman was not made by them, but by the county court; that this committee had been appointed by the county court simply to carry on negotiations with builders and contractors, examine plans and specifications, ascertain cost and expenses, and then report back to the county court with a recommendation of the plan to be adopted by the court. It is then said that the building committee did make a contract with Yeaman to furnish the material, labor, etc., and construct a building at a cost of \$14,000, and at the January term, 1903, presented this contract to the county court for ratification or rejection. At the same time, it is claimed said building committee also reported to the county court an option it had with Yeaman to build a

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larger courthouse at a cost of \$17,500. It is said the county court did not ratify or confirm the contract for the \$14,000 building, which the building committee recommended, but accepted the option for the more commodious and expensive structure. But the court of chancery appeals finds that the report of the building committee was adopted, ratified, and confirmed, since it also embraced the \$17,500 proposition of Jas. H. Yeaman already mentioned. Accordingly a resolution was adopted by that court "authorizing, empowering, and directing the building committee to have said contractor, Jas. H. Yeaman, proceed with the erection and construction of said courthouse on the lot now occupied by the old courthouse, in the town of Gainesboro, Tennessee, in accordance with the terms and provisions of said contract, and the terms and provisions of this decree and order constructing the larger, or seventy by seventy foot, building and report their action to the next October term of the court."

Now it is evidence that the building committee had already entered into a written contract with Yeaman for either the \$14,000 or the \$17,500 building subject to the ratification of the county court. To use the language of the court of chancery appeals: "This committee made their report in which they submitted a plan for a courthouse they had selected as the proper one for the quarterly court to adopt, and further reported they had contracted with and employed J. H. Yeaman, as architect and builder, to build said courthouse, and filed the con-

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tract and stipulations with said court for its consideration."

So that in our opinion the contract was let by the building committee within the meaning of the first section of the act of 1899, although the county court ratified and confirmed its action. It is next insisted that said building committee was not a public officer within the meaning of said act of 1899. Section 3 of said act provides "that if any public officer whose duty it is to let or award contracts shall let or award any contract without requiring a bond for the payment of labor and material, in compliance with section one of said act, shall be guilty of a misdemeanor."

As already seen, it was held by the court in *Rhea Co. v. Sneed*, 105 Tenn., 581, 58 S. W., 1063, that the commissioners appointed by the county court to supervise the construction of a bridge, who let the contract without exacting the bond required by the act of 1899, are not only indictable under said act, but liable in a civil action for any damages resulting to laborers and materialmen who would have been protected by the prescribed bond, if executed. See, also, *Templeton v. Nipper*, 107 Tenn., 548, 64 S. W., 889. So it is evident that the bridge commissioners in *Rhea Co. v. Sneed*, supra, were considered public officers within the meaning of the act of 1899, else no judgment could have been pronounced against them. But it is said the Fidelity & Deposit Co. is liable to complainants for the reason that when Yeaman made default in completing the building, the surety company

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agreed that the building committee might complete with the reserve fund of eighty per cent due Yeaman.

The court of chancery appeals finds that Yeaman, the contractor, quit work on the building some time in November, 1903, and that on December 17, 1903, the building committee notified him in writing that in accordance with the provisions of the bond and contract they would take charge of the building and finish it. A new contract was then entered into between the building committee, Yeaman, and the surety company, by which it was agreed that the reserve fund of twenty per cent, due Yeaman and held by the committee as indemnity could be used to complete the building, and that no bills created prior to January 1, 1904, should be paid out of this reserve fund, amounting to \$3,500. Now it is insisted on behalf of complainants, the materialmen, that the building committee should have applied this fund to the payment of their claims and not to the completion of the building, and then looked to the surety company for reimbursement for the loss, and that, having failed to do so, both the building committee and the surety company making this agreement are both liable for a misappropriation of these funds.

The bond executed by the Fidelity & Deposit Company provided, viz.: "If the said principal shall voluntarily abandon said contract, or be lawfully compelled by the owner to cease operations thereunder, by reason of his nonperformance of any of its terms, or conditions, then the surety shall have the right, in its option, to assume

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said contract and to sublet or complete the same; and if said contract shall be assumed by the surety, then as such contract is duly performed, any reserve deferred payments and all other moneys provided by said contract to be paid to the principal, shall be paid to the surety," etc. Again, it is provided that "if the owner shall complete or sublet the contract . . . then all reserves, deferred payments, and all other moneys provided by said contract to be paid to the principal, shall be paid to the surety at the same time and under the same conditions as by the terms thereof such moneys would have been paid to the principal had the contract been duly performed by him. And if such owner shall complete or relet said contract, then any forfeitures provided in said contract against the principal shall not be operative as against the surety, but all reserves, deferred payments, and all other moneys provided in said contract, which would have been paid to the principal had he completed the contract in accordance with its terms, shall be credited upon any claim the owner may make upon said surety."

The written contract between the building committee and James H. Yeaman, the contractor, entered into on the 6th day of January, 1903, provided as follows: "And should the contractor, at any time during the progress of the work, fail, refuse, or neglect to supply sufficient materials, or workmanship, or refuse, or neglect, to comply with any of the articles of this agreement, the building committee, or architect, shall have the right

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and power to enter upon and take possession of the premises, and to provide materials and workmen sufficient to finish said work after giving a ten days' notice in writing, and the expense shall be deducted from the amount of the contract."

These extracts from the contract and from the bond, we think conferred express authority upon the building committee on default of the contractor in fulfilling his agreement to take possession of the building and building committee deducting the expense from the amount of the contract.

It is to be observed further that under the contract of suretyship, the Fidelity & Deposit Company were entitled to have such reserve fund and deferred payments applied to its exoneration from liability under the contract. We are unable to perceive how complainants are entitled to any recovery against the surety company on account of the appropriation of the reserve fund to the completion of the building. The complainants, as a matter of law, had no lien on the building for labor done or materials furnished, nor had they impounded in any way this reserve fund for the liquidation of their claims. There was no implied obligation resting on the county of Jackson to pay the claims of materialmen or laborers, since these were the obligations of the contractor, James H. Yeaman. There is no implied obligation on the part of the county to pay for material purchased by the contractor, or for labor employed by him, which he has failed to pay. It was so expressly decided in

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Rhea Co. v. Sneed, supra, and in *Templeton v. Nipper*, supra.

As already seen, the contractor in his written agreement with the county of Jackson, through its building committee, had obligated himself "to provide such good, proper, and sufficient materials, of all kinds whatsoever, for the proper and efficient finishing and completing of all work arising under this contract, and all for the sum of \$14,000," etc.

This stipulation was repeated in the contract in the following language: (a) Also "to furnish all materials, labor, scaffolding implements, molds, patterns, templates, and cartage, of every description, for the faithful and prompt performance of this contract." It therefore appears that the county of Jackson was to be at no expense in the erection of said building outside of the stipulated contract price. It was alleged in the bill that the contract and the bond given by the surety company provided that Yeaman will pay for all materials furnished to go into the courthouse, but a careful examination of the contract and bond will show that no such stipulation appears in their instrument.

It turned out that after the completion of the courthouse by the building committee under the new arrangement there was left in its hands a balance of \$750. It appears from the findings of the court of chancery appeals that James H. Yeaman, the contractor, having become indebted to the Bank of Gainesboro for money loaned him and which he expended in the construction

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of the courthouse, J. T. Anderson, cashier of the bank, sued Yeaman and procured a judgment against him, and then ran a garnishment on J. T. Anderson as chairman of the building committee, and in this way secured this fund.

As already stated, no steps were taken by either of the complainants to impound this fund, or any part of the reserve fund due the principal contract on account of his work, and hence they are not entitled now to assert any interest in said fund.

Affirmed.

AMERICAN PUBLISHING COMPANY v. TIP GAMBLE.*(Nashville. December Term, 1905.)*

1. **LIBEL.** Publication of judicial proceedings without incurring liability for damages for a libel, when.

Unless the court itself has prohibited the publication, or the subject-matter is unfit for publication, a newspaper may, in the absence of a malicious purpose, publish a verbatim or substantially fair and reasonable report of judicial proceedings for the information of the public, without incurring liability for damages for a libel. (*Post*, pp. 676-678.)

Cases cited and approved: *Saunders v. Baxter*, 6 Heis., 369; *Fenstermacher v. Publishing Co.* (Utah), 43 Pac., 112, 35 L. R. A., 611; *Upton v. Hume* (Or.), 33 Pac., 810, 21 L. R. A., 493, 41 Am. St. Rep., 863; *Salmon v. Isaac*, 20 L. T., 886, 3 Times L. R., 245; *Ackerman v. Jones*, 37 N. Y. Super. Ct., 42; *Stevens v. Sampson*, 5 Ex. D., 53, 49 L. J. Q. B., 120, 28 W. R., 87, 41 L. T., 782; *Waterfield v. Bishop of Chichester*, 2 Mod., 118; *Salmon v. Isaac*, 20 L. T., 885; *Woodgate v. Ridout*, 4 F. & F., 223; *Regina v. Tanfield*, 42 J. P., 424; *Salisbury v. Union & Advertiser Co.*, 45 Hun, 120; *McBee v. Fulton*, 47 Md., 403; *Flint v. Pike*, 4 B. & Cr., 473, 6 D. & R., 528; *Kane v. Mulvany*, Ir. Rep., 26, 2 C. L., 402; *Lewis v. Walter*, 4 B. & Ald. 605; *Thomas v. Croswell*, 7 Johns, 264; *Grimwade v. Dicks*, 2 Times L. R., 627; *Haywood v. Haywood*, 34 Ch. D., 198, 56 L. J. Ch., 287; 35 W. R., 392, 55 L. T., 729; *Dodson v. Owen*, 2 Times L. R., 111; *Cooper v. Lawson*, 8 A. & E., 746, 1 W. W. & H., 601, 2 Jur., 919, 1 P. & D., 15; *Clement v. Lewis*, (Exch. Ch.), 3 Br. & B., 297, 3 B. & Ald., 702, 7 Moore, 200; *Bishop v. Latimer*, 4 L. T., 775; *Stanly v. Webb*, 4 Sandf. (N. Y.), 21; *Edsall v. Brooks*, 17 Abb. Prac., (N. Y.), 221, 26 How. Prac., 426; *Rail-*

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road v. Wright, 8 L. R., 298; Wason v. Walter, L. C., 4 Q. B., 87, 8 B. & S., 730, 38 L. J. Q. B., 34, 17 W. R., 169, 19 L. T., 418; Cowley v. Pulsifer, 137 Mass., 392.

2. **SAME.** Question for court when language is unambiguous, and question for jury when language is ambiguous.

Where the published and alleged libelous matter is plainly unambiguous, the question of its meaning and character is for the court; but where the meaning is ambiguous, and the words used are reasonably susceptible of two constructions, the one innocent and the other libelous, then it is a question for the jury to determine which construction is the proper one. (*Post*, pp. 678, 684.)

3. **SAME.** Publication of mere pleadings filed in court upon which there has been no judicial action is not privileged.

The privilege and right to publish proceedings in court without liability for damages for libel does not extend to mere pleadings filed in court, upon which there has been no judicial action. (*Post*, pp. 679, 680.)

Cases cited and approved: *Park v. Press Co.*, 73 Mich., 560, 568, 569; *Cowley v. Pulsifer*, 137 Mass., 392; *Barber v. Dispatch Co.*, 3 Mo. App., 377.

4. **SAME.** Same. Injunction granted upon a bill renders its publication privileged.

But the granting of a preliminary injunction upon a bill filed in chancery, though upon an *ex parte* application at chambers, is such judicial action on the bill as renders it a matter of privileged publication. (*Post*, pp. 680-683.)

Cases cited and approved: *McAllister v. Press Co.*, 15 Am. St. Rep., 363, 364; *McBee v. Fulton*, 47 Md., 334; *Metcalf v. Publishing Co.*, 20 R. I., 674, 676; *Wason v. Walter*, L. R., Q. B., 73.

5. **SAME.** Publication of facts constituting a felony is libelous upon its face.

A newspaper publication stating matter about plaintiff which

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would support a charge of fraudulent breach of trust against him, which is a statutory felony, is libelous upon its face. (*Post*, pp. 683, 684.)

6. **SAME.** Construction of language by court; question of fairness and accuracy of publication, and whether malice is to be left to the jury.

Where a fiat for an injunction has been granted upon a bill filed in chancery, it is error in the court to charge the jury unconditionally that a publication thereof is not privileged; the court should construe to the jury the language of the bill and the publication, and should leave it to them to say whether the matter as actually published was a fair and substantially accurate report of the contents of the bill, made without actual malice, and upon this basis should place the question of privilege or nonprivilege, nonliability or liability. (*Post*, pp. 680-684, and especially 684, 685.)

Cases cited and approved: *Kendrick v. Cisco*, 13 Lea, 247; *Railroad v. McKenna*, 13 Lea, 280; *Railroad v. Wynn*, 88 Tenn., 321; *Barker v. Freeland*, 91 Tenn., 112; *Toomey v. Atyoe*, 95 Tenn., 373; *Quigley v. Shedd*, 104 Tenn., 560, 566, 567.

7. **SAME.** Same. Special request for charges as to immaterial mistakes properly refused, when.

In an action of libel for the publication of the contents of a bill filed in chancery against the plaintiff, a request to charge that if certain facts were misstated (as, where it was published that the plaintiff was the attorney for a certain party, when the said bill alleged that he was the attorney of another party), but such misstatement was not material and in no wise affected the alleged libelous matter sued for, such mistake would not afford the plaintiff the right to recover, nor deprive the defendant of his defense as to that part of the publication alleged to be libelous, was properly refused, because the jury would necessarily determine the matter contained in such request in deciding whether the publication complained of was a fair and substantially accurate report of the bill to be charged as stated in the foregoing headnote. (*Post*, pp. 672, 675, 684, 685.)

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8. **SAME.** Special request to charge publication to be a substantial repetition of a chancery bill is properly refused, when.

A request for the court to charge the jury that the alleged libelous publication was, in all its material particulars, substantially a repetition of the allegations contained in the chancery bill, is properly refused, because it asks the court to usurp the functions of the jury, for it is the duty of the court to construe the bill and also the publication, and then leave it to the jury to say whether the publication is a fair and substantially accurate report or reproduction of the bill, as shown in the sixth headnote. (*Post*, pp. 672, 673, 675, 685.)

9. **SAME.** Malice of publisher is not material, except where publication of report of bill in chancery is fair and substantially accurate.

In an action of libel for the publication of an alleged report of the contents of a bill in chancery filed against plaintiff, the question of the publisher's malice is material to the inquiry only on the hypothesis that the jury should find that the publication contained a fair and substantially accurate report of the contents of the bill, for otherwise the publication would not be privileged, and being libelous upon its face, malice in law would be presumed. (*Post*, pp. 672, 673, 675, 686.)

10. **SAME.** Request to charge that publication made "in good faith and without express malice" is not libel is properly refused as too general.

In an action for libel, a request to charge that, if the publication was made "in good faith and without express malice," the jury should find for the defendant, is properly refused as too general, because the request does not instruct as to the nature of this good faith, which embraces, not only the absence of express malice, but also the positive virtue of a fair, impartial, and substantially accurate report of the proceeding which is the subject of the publication. (*Post*, pp. 673, 675, 686.)

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11. **SAME.** Declarations of employee made subsequent to the publication are inadmissible.

In an action against a newspaper for libel in publishing an alleged report of the contents of a chancery bill filed against plaintiff, subsequent declarations made by the reporter who wrote the article that was published are not binding on the defendant, and are inadmissible. (*Post*, pp. 673-675, 686, 687.)

FROM DAVIDSON.

APPEAL from the Circuit Court of Davidson County.—
Jno. W. CHILDRESS, Judge.

MR. JUSTICE NEIL made a statement of the case as follows:

This was an action of libel brought in the circuit court of Davidson county by the defendant in error against the plaintiff in error to recover damages for the publication of an article in the Nashville American. There was a verdict for \$5,000 damages in favor of Col. Gamble against the plaintiff in error, on which judgment was rendered, and from which an appeal has been prayed and prosecuted.

The questions in the case arise out of the following facts:

On the 29th day of January, 1904, Mary Luizer Ham

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filed her bill in the chancery court of Davidson county against Thomas Cartwright, sheriff of the county, T. H. Scott, a deputy sheriff, William Warner & Son, and Tip Gamble. In this bill she alleged that as widow of the late John J. Ham she was the owner of a homestead interest in certain real estate described, that her husband died in July, 1901, and that subsequently she became indebted to William Warner & Son.

The bill then alleged the following:

"On the 19th of August, 1902, a judgment for \$60.85 in favor of William Warner & Son was obtained before Jake Levine, justice of the peace for Davidson county, against the complainant. Some months thereafter complainant paid to Tip Gamble, attorney for William Warner & Son, \$15 to be credited on said judgment but the said Gamble has failed to have the said judgment credited therewith. The true amount, exclusive of cost of said judgment, is \$45.85. On May 19, 1903, by order of Attorney Tip Gamble, execution issued from said justice of the peace and was levied upon 'all the right, interest and claim that Mrs. John J. Ham' might have in said premises, by Henry M. Jordan, a constable for Davidson county, to satisfy said judgment of \$60.85 and costs in favor of William Warner & Son."

The bill further alleged that a writ of *venditioni exponas* had been issued to the sheriff of Davidson county, and that he had advertised Mrs. Ham's lot for sale for the payment of this debt, that she had no interest in

the property which was subject to execution, and that, if the sale should be allowed to proceed, a cloud would be cast upon her homestead right. She therefore prayed that an injunction might issue to restrain the sale. The bill was sworn to by Mrs. Ham, and was thereupon presented to the Honorable J. A. Cartwright, one of the circuit judges of the State, for the purpose of obtaining a fiat for the issuance of an injunction, and this fiat was on that day, by a written order on the back of the bill, granted in the usual form, directing the clerk and master of the chancery court of Davidson county to issue the injunction as prayed.

After the injunction had been so granted the bill was on the next day, January 29, 1904, filed in the office of the aforesaid clerk and master.

On the 30th day of January, 1904, the Nashville American contained the following publication, in respect of the matters above referred to:

"TO INHIBIT SALE.

"Mary Luizer Ham filed a chancery bill Friday against Thomas Cartwright, sheriff, T. H. Scott, deputy sheriff, William Warner & Son, and Tip Gamble, seeking to restrain the sale of a lot to satisfy a circuit court judgment of \$60.85. It is alleged the complainant has a life interest in the property, and, further, that a portion of the judgment was paid to her attorney, Tip Gamble, but that he applied the money to his own use, instead of having it paid over on the judgment. A temporary injunction was issued."

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The present suit was brought to recover damages for the injury inflicted by the publication just quoted.

The defendant pleaded not guilty.

His honor in his charge, after stating that the defendant claimed the publication was a privileged one, because it contained the substance of the bill already referred to, and that no malice was entertained or wrong intended, further instructed the jury, as follows:

(A) "The court instructs you that the words alleged to have been published, as set forth in the plaintiff's declaration, were libelous of themselves, and, if the defendant did publish them as alleged therein, the defendant company is liable in damages to the plaintiff therefor.

(B) "The court further instructs you that the publication was not privileged, and as such under the facts of this case cannot be relied upon by the defendant in bar of the plaintiff's action therefor.

(C) "If you shall find that the defendant company, in its issue of the date aforesaid mentioned, did make and publish libelous matter as set forth in the plaintiff's declaration, then and in that event your verdict should be for the plaintiff."

Upon the subject of damages the court charged the jury as follows:

"Should you find for the plaintiff, you shall proceed to award him such damages as would reasonably compensate him for the injuries inflicted, taking into account in estimating same the manner in which it was

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made, the nature of its circulation and distribution, and all of the facts and circumstances adduced in the proof tending to show the manner and purpose of the same, and while the amount to be awarded within the sum sued for is within your discretion that discretion should be exercised without passion or prejudice, and with the view to simply award only such sum as would compensate for the injuries resulting from the publication of such a libelous matter."

After the court had thus charged the jury, the counsel for plaintiff in error presented to his honor certain instructions which he asked should be given to the jury, but they were all refused. They were as follows:

"(1) A publication in a newspaper of the contents of a bill filed in a judicial proceeding upon which a fiat for injunction has been granted, when the contents published are pertinent and material to the relief sought, cannot be made the basis of a recovery in a libel suit, even though the contents of said bill so published are false and untrue, unless it appears that the paper making said publication was actuated by malice, and in such case malice is not presumed, but it is incumbent on plaintiff to prove its existence before he is entitled to recover.

"(2) In undertaking to publish the contents of a court pleading, in order to be entitled to the conditional privilege which the law extends to newspapers in making said publication, the paper is not required to publish the whole of said pleading. It is sufficient if the

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substance of all that relates to the alleged libelous matter, or that in any way reflects on it, is fairly and impartially stated.

- “(3) If in the publication of the contents of pleadings in court, which publication is made the basis of a suit for libel, it appears that certain facts are misstated, as, for instance, it is published that the plaintiff was the attorney of one party, when, as a matter of fact, the pleading in question alleged that he was the attorney of another party, and the misstatement of this fact was not material to and in no wise affected the alleged libelous matter sued for, such a mistake would not afford the plaintiff the right to recover, nor deprive the defendant of his defense as to that part of the publication alleged to be libelous.

“(4) It is the province of the court to interpret and construe the publication sued on in this case and introduced in evidence by the plaintiff in support of his action, and it is your duty to receive this publication with such construction or interpretation as the court puts on it, and I charge you that said publication in all its material particulars is substantially a repetition of the charges made against the plaintiff in the chancery court bill, which has been introduced in evidence in this case; and I further charge you that for the making of this publication the defendant cannot be held liable in this suit, unless it appears from the proof that said publication was maliciously made. Malice will not be presumed, but may be proven, the burden of proving it

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being on the plaintiff, and, if there is in this record no evidence of malice on the part of the defendant towards the plaintiff, then you should return your verdict for the defendant; and the fact that the charge against the plaintiff as made in the bill and repeated in the publication sued on is admitted to be false would not change or alter this result.

“(5) If you find from the evidence that the publication made by the defendant was a fair and substantially true and accurate account of a bill filed in a court of record upon which an injunction was issued, and that the said publication was made in good faith, and not with a malicious motive, then I charge you that you should find for the defendant.

“(6) If you find from the evidence in this cause that the publication made by the defendant was made in good faith and without express malice, then I charge you that you should find for the defendant.

“(7) Although you may find the defendant liable in the case, yet, if the proof shows that the publication was not the result of actual malice, this fact should be considered by you in mitigation of the damages you would otherwise award.”

During the progress of the trial the plaintiff below introduced John W. Fisher, who, over the objection of the defendant below, testified to a conversation that had passed between himself and W. S. Kane, a reporter on the Nashville American. Mr. Fisher testified, in sub-

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stance, that on Sunday night after the publication had appeared in the paper he had a conversation with Mr. Kane, the reporter who wrote the article, in which conversation Mr. Kane said, in substance, that he had seen Col. Gamble's card in the Nashville Banner denying the publication as made in the Nashville American, and that upon seeing this card he again went to the courthouse and re-read the bill to see if he had made a mistake, and that he said the bill was susceptible of two constructions "and that newspapers wanted the sensational features."

When this evidence was offered, the following occurred:

"The defendant objects to any conversation between Mr. Kane and witness, as they are outside parties, and Mr. Kane is not a party to the lawsuit, and this is a transaction after the publication."

By Mr. Smith, for plaintiff:

"We propose to prove by Mr. Fisher declarations on the part of this reporter showing the motive with which this publication was made concerning Col. Gamble, upon the question of malice, and this question goes, as your honor will see, to the very bottom of our lawsuit, not only to its main features."

By Mr. Anderson, for defendant:

"The point of our objection is that that evidence is not binding or competent against the Nashville American any more than the statement of any other witness."

By the court:

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"I cannot see, with my view of the case, the relevancy of it. All you have to prove under your declaration is to show that publication was made, and it is libelous on its face and there is no justification of it. Therefore you did not even have to deny the correctness of it, as it is libelous on its face, and they have no plea of justification. I will hear the witness, and if I change my opinion I can instruct the jury upon it afterwards."

Thereupon the witness was allowed to proceed and make his statement, the substance of which has been already given. The court made no subsequent ruling upon this evidence.

There are five errors assigned as follows: Firstly, that there is no evidence to support the verdict; secondly, that the damages assessed by the jury are so excessive as to evince passion, prejudice, or caprice; thirdly, that the court, erroneously charged the three paragraphs which we have marked (A), (B), and (C); fourthly, that he failed to give in charge to the jury the several instructions which we have marked 1 to 7, inclusive; fifthly, that he erroneously admitted the testimony of the witness Fisher.

J. M. ANDERSON, J. C. BRADFORD, and ROBIN C. COOPER,
for the American Publishing Co.

JNO. B. DANIEL, W. D. COVINGTON, A. F. WHITMAN,
FIRMAN SMITH, and JNO. E. FISHER, for Gamble.

MR. JUSTICE NEIL, after making the foregoing statement of facts, delivered the opinion of the court.

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Unless the court has itself prohibited the publication, or the subject-matter of the trial be unfit for publication (Newell, Def., S. & L., p. 548, section 150), any one may, without incurring liability for damages, publish the proceedings of courts of justice (Newell on Def., S. & L., p. 544, section 147); and the owners of newspapers occupy in respect of such publications the same status as that accorded to other persons, in no respect higher or different (*Fenstermacher v. Tribune Pub. Co.*, [Utah], 43 Pac., 112, 35 L. R. A., 611; *Upton v. Hume* [Or.], 33 Pac., 810, 21 L. R. A., 493, 41 Am. St. Rep., 863; Newell, Def., S. & L. p. 552, section 158; *Brett, L. J.*, 46 L. J. C. P., 407; *Bramwell, L. J.*, 5 Ex. D., 56; *Salmon v. Isaac*, 20 L. T., 886, 3 Times L. R., 245).

The right to publish is subject to the limitation that the report must be a fair one, made in the interest of the public, and without malicious purpose. Newell, Def., S. & L., p. 558, section 166; *Ackerman v. Jones*, 37 N. Y. Super. Ct., 42; Newell, p. 544, section 148, subd. 3; *Saunders v. Baxter*, 6 Heisk., 369; *Stevens v. Sampson*, 5 Ex. D., 53; 49 L. J. Q. B., 120; 28 W. R., 87; 41 L. T., 782; Newell, p. 556, section 162, subd. 7; *Waterfield v. Bishop of Chichester*, 2 Mod., 118; Newell, p. 556, section 9; *Salmon v. Isaac*, 20 L. T., 885; Newell, p. 556, section 10. Such report should not be mingled with comment, either in the body of it or in the heading, as in such case the presumption of malice would the more easily arise; the place for criticism of this character is in the editorial columns (Newell, Def., S. & L., c. 20, section 19; Mer-

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rill's Newspaper Libel, 184); and even then the comment should be fair and reasonable (Newell, Def., S. & L., c. 20, section 18; *Woodgate v. Ridout*, 4 F. & F., 223; *Reg. v. Tanfield*, 42 J. P., 424).

The report need not be a verbatim one, but it must contain the substance of the thing it undertakes to present, or the whole purport of any special, separable part. Newell, p. 552, section 156; *Id.*, p. 554, section 161; *Salisbury v. Union & Advertiser Co.*, 45 Hun (N. Y.), 120; Newell, 545; *McBee v. Fulton*, 47 Md., 403, 28 Am. Rep., 465; *Flint v. Pike*, 4 B. & Cr., 473; 6 D. & R., 528; *Kane v. Mulvany*, Ir. Rep., 26, 2 C. L., 402; Newell, p. 553, section 160, subd. 3; *Lewis v. Walter*, 4 B. & Ald., 605; Newell, p. 553, section 160, subd. 4. It must not give undue prominence to inculpatory facts, and depress or minify such facts as would explain or qualify the former (*Salisbury v. Union & Adv. Co.*, supra; Newell, p. 554, section 161; *Thomas v. Croswell*, 7 Johns. [N. Y.], 264, 5 Am. Dec., 269; Newell, p. 557; *Grimwade v. Dicks*, 2 Times L. R., 627; Newell, p. 555; *Haywood & Co. v. Haywood & Sons*, 34 Ch. D., 198; 56 L. J. Ch., 287; 35 W. R., 392; 55 L. T., 729; Newell, p. 555; *Dodson v. Owen*, 2 Times L. R., 111; Newell, p. 556, S. S. 8), and must not omit material points in favor of the complaining party, or introduce extraneous matters of an injurious nature to him (*Cooper v. Lawson*, 8 A. & E., 746; 1 W. W. & H., 601; 2 Jur., 919; 1 P. & D., 15; Newell, p. 558; *Clement v. Lewis* [Exch. Ch.], 3 Br. & B., 297; 3

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B. & Ald., 702; 7 Moore, 200; *Bishop v. Latimer*, 4 L. T., 775; Newell, p. 558).

In short, the report must be characterized by fair-mindedness, honesty, and accuracy. Newell, Def., S. & L., p. 551, section 155; *Stanley v. Webb*, 4 Sandf. (N. Y.), 21; *Hdsall v. Brooks*, 17 Abb. Prac. (N. Y.), 221; Id., 26 How. Prac., 426; Newell, p. 545.

If it be found of this character, it is not material that the matter it contains is injurious to the persons involved or referred to therein, since it is of the highest moment that the proceedings of courts of justice should at all times be open to fair inspection, to the end that the public may have the means of knowing how the duties of their officers are preformed, whether faithfully and intelligently or otherwise. In the presence of this public requirement mere private interests must give way. *R. v. Wright*, 8 T. R., 298; *Wason v. Walter*, L. C. 4 Q. B., 87; 8 B. & S., 730; 38 L. J. Q. B., 34; 17 W. R., 169; 19 L. T., 418; Newell, p. 554, section 147; *Cowley v. Pulsifer*, 137 Mass., 392, 50 Am. Rep., 318.

Where the published matter is plainly unambiguous, the question of its meaning and character is for the court; but where the meaning is ambiguous, where the words used are reasonably susceptible of two constructions, the one innocent and the other libelous, then it is a question for the jury which construction is the proper one. Newell, Def., S. & L., c. 15, secs. 1, 5.

"In these cases," says Newell, "there may be two distinct questions for the jury: (1) Is the report fair and

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accurate? If so, it is *prima facie* privileged; if not, the verdict must be for the plaintiff. (2) Was the report, though fair and accurate, published maliciously? Was it published solely to afford information to the public and for the benefit of society, without reference to the individuals concerned; or was it published with the malicious intention of injuring the reputation of the plaintiff? The second question, of course, only arises when the first has been already answered in the affirmative.

"And, of course, there is in each case the previous question for the court, is there any evidence to go to the jury of inaccuracy or of malice? Where there is no suggestion of malice, and no evidence on which a reasonable man could find that the report is not absolutely fair, the judge should direct a verdict for the defendant. Thus where the report is verbatim or nearly so, or corresponds in all material particulars with a report taken by an impartial shorthand writer. But, if anything be omitted in the report which could make any appreciable difference in the plaintiff's favor, or anything erroneously inserted which could conceivably tell against him, then it is a question for the jury whether such deviation from absolute accuracy makes the report unfair; and the trial judge will not direct a verdict for either party." *Id.*, pp. 558, 559, section 166.

It is generally agreed that the privilege, the right to publish without liability for damages, does not extend to mere pleadings filed in court, as, for example, bills in equity upon which there has been no judicial action.

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Park v. Detroit Free Press Co., 72 Mich., 560, 568, 40 N. W., 731, 1 L. R. A., 599, 16 Am. St. Rep., 544; *Cowley v. Pulsifer*, 137 Mass., 392, 50 Am. Rep., 318; *Barber v. St. Louis Dispatch Co.*, 3 Mo. App., 377. The reason for this rule is thus stated in *Park v. Detroit Free Press Co.*: "There is no rule of law which authorizes any but the parties interested to handle the files or publish the contents of their matters in litigation. The parties, and none but the parties, control them. One of the reasons why parties are privileged from suit for accusations made in their pleadings is that the pleadings are addressed to courts where the facts can be fairly tried, and to no other readers. If pleadings and the documents can be published to the world by any one who gets access to them, no more effectual way of doing malicious mischief with impunity could be devised than filing papers containing false and scurrilous charges, and getting these printed as news. . . . A suit thus brought with scandalous accusations may be discontinued without any attempt to try it, or on trial the case may entirely fail of proof or probability. The law has never authorized any such mischief." 72 Mich., 568, 569, 40 N. W., 734. Of publications of pleadings containing injurious matter at the mere incipency of the litigation it is said: "They possess no privilege, and the publication must rest on either nonlibelous character, or truth, to defend it." 72 Mich., 568, 40 N. W., 734.

However, the rule of privilege, in general, covers proceedings which are in their nature only preliminary if

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any judicial action has been had thereon. Newell, Def., S. & L., c. 19, section 149, note; Id., 152, 153, and notes; Odgers on Libel and Slander (3d Ed.), pp. 278, 279; Townsend on Slander and Libel, p. 361; note to *McAllister v. Detroit Free Press Company*, 15 Am. St. Rep., 363; 364; *McBee v. Fulton*, 47 Md., 334, 28 Am. Rep., 465; *Metcalf v. Times Publishing Company*, 20 R. I., 674, 40 Atl., 864, 78 Am. St. Rep., 900.

In the case last mentioned the special phase of the question we now have before us was considered and decided. It was there held that, after a bill in equity had been submitted to a judge at chambers on an application for a preliminary injunction, and the order had been granted, this was such judicial action as rendered the bill matter of privileged publication. Said the court: "It is a matter submitted to a judge, and he acts upon it. It is within the rule, and the cases which we have referred to. . . . If this was not judicial action, it would be difficult to say what would be, short of a full trial of the case. Although the motion was in chambers, still, under our practice, as all such motions and interlocutory orders are made in chambers, technically we cannot say that it was not in court." 20 R. I., 679, 40 Atl., 866, 78 Am. St. Rep., 900. And see the discussion of the general subject in *McBee v. Fulton*, 28 Am. Rep., 464-474. On page 473 it is said, quoting the judgment of Cockburn, C. J., in *Wason v. Walter*, L. R. Q. B., 73: "Whatever disadvantages attach to a system of unwritten law, and of these we are fully sensible, it has at least

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this advantage, that its elasticity enables those who administer it to adopt it to the varying conditions of society, and to the requirements and habits of the age in which we live, so as to avoid the inconsistencies and injustice which arise when the law is no longer in harmony with the wants and usages and interests of the generation to which it is immediately applied. Our law of libel has in many respects only gradually developed itself into anything like a satisfactory and settled form. The recognition of the right to publish the proceedings of courts of justice is of modern growth. Till a comparatively recent time the sanction of the judges was thought necessary even for the publication of the decisions of the courts upon points of law. Even in quite recent days judges in holding publication of the proceedings of courts of justice lawful have thought it necessary to distinguish what are called *ex parte* proceedings as a probable exception from the operation of the rule. Yet *ex parte* proceedings before magistrates, and even before this court, as, for instance, our applications for criminal information, are published every day, but such a thing as an action or indictment founded on a report of such an *ex parte* proceeding is unheard of. If any such action or indictment should be brought, it would probably be held that the true criterion of the privilege is not whether the report was or was not *ex parte*, but whether it was a fair and honest report of what had taken place, published simply with a view to the information of the public, and innocent of all in-

tention to do injury to the reputation of the party affected."

Applications for preliminary injunctions are in this state usually of the same *ex parte* character described in the Rhode Island case, and under this practice the bill referred to in the present case was presented to Judge Cartwright, and the fiat was granted by him. The granting of that fiat was a judicial act. The bill, therefore, after having been made the subject of such action, and upon thereafter having been placed in the files of the chancery court, became a paper which might be published within the protection of the privileged list.

We shall now apply the foregoing principles, so far as may be necessary, to the questions raised by the assignments of error.

We shall pretermit any discussion of the matters contained in the first and second assignments.

(The third assignment makes the point that the circuit judge erred in charging the jury as set forth in the propositions marked (A), (B), and (C), in the statement. The instructions thus given were, in substance, that the publication complained of was, on its face, libelous, that it was not privileged, and that the defendant below was liable in damages therefor.

We are of the opinion that his honor acted correctly in instructing the jury that the publication was libelous on its face, since it stated matter which would support a charge of fraudulent breach of trust against the plain-

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tiff in error, which is a felony under the statutes of this state.

His honor acted incorrectly in instructing the jury unconditionally that the matter contained in the publication was not privileged. He should have given them in charge the first, second, and fifth instructions appearing under the fourth assignment of errors, and should at the same time have construed to the jury the language of the bill, also the language of the publication. It is the duty of the court to construe "unambiguous writings upon which the rights of parties are based." *Quigley v. Shedd*, 104 Tenn., 560, 566, 567, 58 S. W., 266; *Railway v. Wynn*, 88 Tenn., 321, 14 S. W., 311; *Barker v. Freeland*, 91 Tenn., 112, 18 S. W., 60; *Toomey v. Atyoe*, 95 Tenn., 373, 32 S. W., 254; *Railroad Co. v. McKenna*, 13 Lea, 280; *Kendrick v. Cisco*, 13 Lea, 247. Having so construed the writings, he should have left it to the jury to say whether the matter as actually published was a fair and substantially accurate report of the contents of the bill, and without actual malice; and upon this basis should have placed the question of privilege or nonprivilege, liability or nonliability.

We do not think his honor erred in refusing to charge the third instruction appearing under the fourth assignment of error. The jury would necessarily determine the matter therein referred to in deciding whether the publication complained of was a fair and substantially accurate report of the bill, and this they will be enabled

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to do in the next trial when instructed according to the directions contained in the preceding paragraph.

The court below did not err in refusing to charge plaintiff in error's fourth instruction. The error in this instruction was that plaintiff in error thereby sought to have his honor charge the jury that the publication complained of was, in all its material particulars, substantially a repetition of the allegations contained in the chancery bill, thereby asking the court to usurp the functions of the jury. As already indicated, it was the duty of the court to construe the bill and also the publication, and then leave it to the jury to say whether the latter was a fair and substantially accurate report, or reproduction of the former.

The proposition in respect of malice, contained in the instruction referred to, would also have been misleading to the jury if given in union with the erroneous matter just referred to. They were sound only upon the hypothesis that the jury should find that the publication contained a fair and substantially accurate report of the contents of the bill upon the subject referred to in such report. If the publication failed, in the estimation of the jury, to come up to this description, then it could not be held privileged, and, being libelous on its face, malice in law would be presumed. If it did attain the plane of privilege, then plaintiff in error could be held liable only upon proof of express malice as set forth in the instruction under examination. We assume that it was the purpose of the instruction

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to call the attention of the jury to the subject of express malice, as distinguished from implied malice, or malice in law, but this is not done with sufficient clearness.

The sixth instruction, appearing under the fourth assignment, was properly refused, because too general. It is not sufficient to instruct the jury merely that, if the publication was made "in good faith" and without express malice, they should find for the defendant. They should be instructed as to the nature of this good faith, which embraces, not only the absence of express malice, but also the positive, virtue of a fair, impartial, and substantially accurate report of the proceeding which is the subject of the publication.

The court below did not err in refusing the seventh instruction. The charge as given sufficiently covered the question of damages.

The fifth assignment must be sustained. The testimony therein referred to was incompetent. 1 Elliott on Ev., section 252. It consisted merely of statements made by a reporter of the Nashville American, after the publication had appeared in the paper, expressing his opinion that the chancery bill was capable of two constructions, and giving the reason why he had adopted the one construction rather than the other in preparing his matter for the press. This was merely the narrative of a past transaction, not the statement of an agent while in the active discharge of his duty as such, and in respect of matters then in course of dispatch. Nor was the testimony rendered competent through the state-

ment made by Mr. Kane, to the effect that he had seen Col. Gamble's publication in the Nashville Banner, and had thereby been induced to make a second examination of the chancery bill with a view to ascertaining whether he had been mistaken in his first construction. It is insisted that this testimony was competent for the purpose of showing that the Nashville American had knowledge of the false character of its publication before the suit was brought, and yet had not published a retraction. It is not shown in the evidence that Mr. Kane stood in such relation to the plaintiff in error as that notice to him, after the transaction, would be notice to his employer. The mere fact that he was the reporter who had furnished the objectionable matter would not be sufficient.

We have considered the other reasons offered in defendant in error's brief in support of the competency of the evidence, and find none of them well taken.

For the errors indicated, the judgment of the court below must be reversed, and the cause remanded for a new trial.

Stone Co. v. Pugh.

FOSTER-HERBERT CUT STONE COMPANY v. HATTIE PUGH.

(*Nashville*. December Term, 1905).

1. **PERSONAL INJURIES.** Owner of wagon in charge of a skillful driver is not liable for injuries to a child thereon at driver's invitation, when.

The owner of a wagon in charge of a skillful driver is not liable for the death of a child fatally injured in attempting to alight from the wagon after having climbed thereon at the invitation of the driver who was neither expressly nor by implication authorized to invite children to get upon a wagon, and whose act in so doing was in no sense within the scope of his employment or in the furtherance of his employer's business.

Cases cited and approved: *Puryear v. Thompson*, 5 Hum., 397; *Cantrell v. Colwell*, 3 Head, 472; *Diehl v. Ottenville*, 14 Lea, 191; *Powers v. Railroad*, 153 Mass., 188; *Bowler v. O'Connell*, 162 Mass., 319; *Driscoll v. Scanlon*, 165 Mass., 348; *Morris v. Brown*, 111 N. Y., 318; *Cook v. Navigation Co.*, 76 Tex., 353.

2. **SAME.** Same. Stone wagon with bed below axles, in charge of a skillful driver, is not so dangerously attractive to children as to require extraordinary care by the owner, when.

A wagon constructed with the bed below the axles, for the purpose of hauling stone, is not an appliance so dangerous and attractive to children as to require the owner to exercise greater care with reference to the use thereof than putting it in charge of a skillful, careful, and prudent driver. (*Post*, pp. 690, 698-700.)

Cases cited and approved: *Walsh v. Railroad*, 145 N. Y., 301; *Daniels v. Railroad*, 154 Mass., 349; *Frost v. Railroad*, 64 N. H., 220.)

Cases cited and distinguished: *Whirley v. Whiteman*, 1 Head, 619; *Railroad v. Starnes*, 9 Heis., 52; *Bates v. Railroad*, 90

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Tenn., 36; Cooper v. Overton, 102 Tenn., 235; Burke v. Ellis, 105 Tenn., 702; Railroad v. Stout, 84 U. S., 657; Lynch v. Nurdling, 1 Q. B., 29.

FROM DAVIDSON.

Appeal from the Circuit Court of Davidson County.
—JNO. W. CHILDERS, Judge.

J. M. & DOUGLASS ANDERSON, for Stone Co.

K. T. M'CONNICO and W. H. WASHINGTON, for Pugh.

MR. CHIEF JUSTICE BEARD delivered the opinion of the Court.

This action was brought to recover damages for the death of a boy about six years of age, resulting, as is alleged, from the actionable negligence of the plaintiff in error. The facts are that the mother of the deceased was employed in a factory of Nashville, and on the day of the accident had left the boy at and in the care of a charitable institution located near the place of her employment, where a large number of children of tender years were cared for during the day and while their parents were absent from their homes at work. At that time some improvements were being made upon the building occupied by those in charge of the institution,

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and the plaintiff in error contributed the stone needed for that purpose, and sent its wagon under the charge of a careful driver to deliver the stone. The plaintiff in error had knowledge of the character of this institution and that daily a great many small children were assembled at it and cared for by its managers.

The wagon used upon this occasion was one constructed for and adapted to the purpose of receiving and delivering stone, and its only peculiarity was that its bed, instead of being raised above the axles, was below them, and so was nearer the ground than a bed of a farm or any other wagon in general use. At the time this delivery took place many children of various ages and sizes were playing on the premises of the institution. Upon the approach of the wagon a number of these children were attracted to it, and some of them as it entered the premises climbed upon it, but under the direction of the driver at once dismounted.

After the wagon stopped, and while the stones were being unloaded, the children in considerable numbers gathered around and were eager to get upon it, but were forbidden by the driver, who said to them, however, "Wait until I am rid of this load, and then I will give you a ride." Immediately after the work of unloading was finished, several of these children clambered upon the wagon, and the driver started upon his return trip. After riding a short distance they began one after another to dismount, and in undertaking to do likewise the deceased either fell or jumped to the ground between

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the wheels, and one of these, passing over his body, so badly injured him that he soon afterwards died.

It is also in evidence, that young Pugh called to the driver once, if not twice, to stop and let him get down, but, either disregarding the call if heard, or else not hearing it, the driver did not stop, so that the boy, while undertaking to leave the wagon still in motion, or falling received the injury complained of.

The declaration contains three counts. The case was rested for the plaintiff, however, upon a fourth count, embraced in an amended declaration, which in substance averred that the defendant sent upon the premises in question a wagon of such nature and description as to be both dangerous and attractive to children, great numbers of whom the defendant knew were left during the day by their parents; that the driver in charge of the wagon was incompetent and unfit; that the defendant failed to provide sufficient servants to deliver the stone, and negligently failed to provide any safeguard or protection while the wagon was being unloaded; and that when it was leaving the premises, its driver having negligently permitted the deceased to mount the wagon, the latter fell therefrom and was fatally injured.

Upon the trial of the issue made by a plea of not guilty, the testimony of the plaintiff disclosed the facts as set out in the beginning of this opinion. At its close the defendant demurred to the evidence, and, its demurrer being overruled, the case went to the jury to ascertain the damages sustained, whereupon a verdict was re-

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turned in favor of the plaintiff for \$2,500. From the judgment thereon the defendant has prosecuted an appeal in the nature of a writ of error.

From a careful examination of this record we are unable to discover any legal ground upon which the verdict and judgment can rest. The case made out is one where a skillful driver is placed in charge of his master's wagon, with direction that he deliver pieces of dressed stone at a place where they are to be used in making some improvement. Having arrived there and unloaded the stone, a number of children, who were gathered about, in answer to his invitation got upon the wagon to enjoy a ride, and while riding away from the premises one of these children, either in falling or undertaking to jump from the wagon, is run over by one of its wheels and is so injured that death soon results. It is not claimed that the driver was either expressly or by implication authorized by his master to extend the invitation to the children to get upon the wagon, or that this act of the servant was in any sense or degree within the scope of his employment or in furtherance of his master's business. Under these facts we think it is well settled the master cannot be called upon to respond in damages for the injury resulting from such unauthorized act. *Puryear v. Thompson*, 5 Humph., 397; *Cantrell v. Colwell*, 3 Head, 472; *Diehl v. Ottenville*, 14 Lea, 191.

These cases lay down the rule which we think controlling here, but many are to be found where the rule has been applied to acts very similar to those presented in

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this record. In *Driscoll v. Scanlon*, 165 Mass., 348, 43 N. E., 100, 52 Am. St. Rep., 523, the facts were that a boy of nine accepted the invitation of a driver of a dump cart, belonging to the defendant, to get upon the cart and take a ride, during which the boy was injured.

In an action against the master to recover for the injury, in sustaining the ruling of the trial court that on these facts there could be no recovery, the supreme court said: "It was not within the scope of the employment of the driver of the dump cart to invite persons to ride upon it for their pleasure"—citing *Bowler v. O'Connell*, 162 Mass., 319, 38 N. E., 498, 27 L. R. A., 173, 44 Am. St. Rep., 359; *Powers v. Boston & M. R. R. Co.*, 153 Mass., 188, 26 N. E., 446. In *Morris v. Brown*, 111 N. Y., 318, 18 N. E., 722, 7 Am. St. Rep., 751, it is said: "Where a servant is employed to manage a dump cart hauling stone and other material out of a tunnel, he has no authority to assent to a third person riding in his car, and his permitting such person so to ride is not equivalent to an invitation by his master and cannot make him answerable for acts or omission in the management of the car from which the person so riding is killed or suffers substantial injuries." So, in *Cook v. Houston, etc., Navigation Co.*, 76 Tex., 353, 13 S. W., 475, 18 Am. St. Rep., 52, it was held that where a minor child was drowned, through having been invited on the tugboat by the servants of the owner, which act was outside their authority and against orders, no recovery could be had. But, as has already been stated, the main reliance of the

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defendant in error, in order to maintain the judgment in this case, is in the assumption that the wagon, on account of its peculiar construction, was so dangerously attractive to young children that the duty devolved upon the owner to exercise corresponding diligence to see that no injury resulted to them therefrom, and, failing to do so in the present case, it is liable.

The record disclosed that the defendant in error is engaged in the stone business, and that this wagon was constructed for and was adapted to use in that business. Evidently with a view to this use it was built with a low bed for the easy hoisting of stone into it and of unloading stone from it. Its peculiarity consisted alone in this feature of its construction. It is true, thus built, it was more easily mounted by small children than if its bed had been placed above the axles. But can it be said that this increased facility to children in ascending to the bed made it so dangerous and attractive to children that the owner could not, without the peril of liability for injury to a thoughtless child, received while either mounting to or dismounting from it, send it out in the course of his business with a careful driver, unless he had at the same time one or more reliable guards along to warn such a one away? For it is to be observed that if the contention of the defendant in error that the owner of this wagon is liable for the killing of Pugh, because he sent this dangerous agency to the place in question, though under the charge of a prudent driver, then it would have been equally liable for a like accident oc-

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curing in one of the throughfares of Nashville; for on these at all hours of the day it would be conceded that many children are in the habit of passing unattended by persons of sufficient discretion to keep them out of danger.

It is a matter of common observation, which cannot be ignored by the court, that the instinct of a boy impels him to mount, where permitted to do so, and even in the absence of permission, a moving vehicle, whatever its construction or the purpose for which it is used. An ordinary farm wagon, a dump cart, a carriage, or a buggy equally invites him, yet it would hardly be argued that for an injury occurring like the one in question, and under conditions existing in this case on one of these vehicles its owner would be liable. The case of *Whirley v. Whiteman*, 1 Head, 619, is no authority for the contention of the counsel for the defendant in error. In that case there was dangerous machinery in operation uninclosed and unguarded, with the knowledge of the owner that small children were in the habit of playing in dangerous proximity to it.

Lynch v. Nurdling, 1 Q. B., 29, referred to with approval in *Whirley's Case*, equally fails to support this contention.

There the facts were that the defendant servant's left the master's horse and cart in a public street unattended while he was visiting in a neighboring house. In the meantime several children engaged in climbing into and out of the cart, and as the plaintiff was get-

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ting down from it another boy caused the horse to move, in consequence of which the plaintiff fell and received the injury complained of. Lord Denman, in disposing of the motion for a rule *nisi* made by the defendant for a new trial on the ground of misdirection and that the verdict was against the evidence, said "that upon the facts established the question of negligence was strictly within the province of a jury;" that "they would naturally inquire whether the horse was vicious or steady, and whether the occasion required the servant to be so long absent from his charge, and whether in that case no assistance could be procured to watch the horse, whether the street at that hour was likely to be clear or thronged with a multitude, and especially whether large parties of young children might be reasonably expected to resort to the spot. If this last-mentioned fact were probable, it would be hard to say that a case of gross negligence was not fully established."

Leaving a horse and cart in a public street unattended and loose, subject to natural observation and interference from children passing along the street, might be held a proper question for a jury to say whether it was or was not negligence. But the facts of that case furnish no analogy to those of the present, where the owner has placed his wagon under the direction of a careful driver in the course of his business, and the injury occurs, not in the absence of the driver, but in his presence and as a result of his unauthorized act.

The case of *Burke v. Ellis*, 105 Tenn., 702, 58 S. W.,

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855, is relied upon with much confidence as sustaining the present judgment.

In that case it seems the receiver of a railroad was held liable for the injury sustained by a child, who was permitted by those in charge of a car loaded with dirt to climb and ride upon it, and who while so doing fell off and was run over. In the court below the trial judge said to the jury "that if the plaintiff was a child of only six or seven years of age, and was allowed by the receiver and employees to get upon and ride on the car loaded with dirt, and while so riding he fell off and was injured by the car running over him, and this was the proximate cause of the injury, the receiver would be liable." To the criticism made upon this charge it was said by this court, speaking through Wilkes, J., that there was no error in it; the court adding: "It is negligence *per se* to permit a child of such tender years to climb on and ride upon a car loaded with loose earth that is liable to slip and throw the child off at any time . . . An open car loaded with earth is such an inducement as would naturally lead children into danger, and it was negligence not to keep them away from the cars under such circumstances. There is proof tending to show that the child was not only permitted, but invited to ride by the railroad employees and with the knowledge of the superintendent."

The authority of this case must be confined within the narrow limits of its own facts and will not be extended to support a judgment resting on facts like those

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presented in this record. In *Nashville & Chattanooga R. R. v. Starnes*, 56 Tenn., 52, 24 Am. Rep., 296, while recognizing the established doctrine of the common law that the master is not liable for the torts of his servant, committed not in the line of the master's service, or with his consent or ratification, yet it was held that a party injured as the result of the wanton blowing by an engineer of his whistle could recover against the railroad company because of the absolute necessity for more stringent care in the protection of life and property against the perils of the steam engine with its capacity for mischief.

In addition, the *Burke Case* shows that the invitation was extended to the child, whose injuries were there in question, by the railroad employees with the knowledge of the superintendent, who evidently was a superior officer of the company and might well be held *pro hac vice* to be the corporation itself.

The doctrine of an attractive nuisance—and this after all is at the bottom of the contention—while by no means having its beginning, at least found material support, in the case of *Sioux City, etc., R. R. Co. v. Stout*, 84 U. S., 657, 21 L. Ed., 745. This was the first of what are called “the turntable cases.” While this case has been followed by the supreme court of the United States in a number of subsequent cases, and by the courts of last resort of several of the states, yet its authority has been partially or absolutely repudiated in others. Among the cases of the latter class are *Walsh v. Fitch-*

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burg R. R. Co., 145 N. Y., 301, 39 N. E., 1068, 27 L. R. A., 724, 45 Am. St. Rep., 615; *Daniels v. N. Y. & C. R. Co.*, 154 Mass., 349, 28 N. E., 283, 13 L. R. A., 248, 26 Am. St. Rep., 253; *Frost v. E. R. R. Co.*, 64 N. H., 220, 9 Atl., 790, 10 Am. St. Rep., 396.

While the case of *Walsh v. Fitchburg R. R. Co.*, supra, and those following it, are not mentioned in *Bates v. Railway Co.*, 90 Tenn., 36, 15 S. W., 1069, 25 Am. St. Rep., 665, yet the effect of the holding of this court in this latter case was to impose very much of a limitation upon the rule announced in the former. That was a case where a boy of nine was injured upon the turntable belonging to the defendant railroad company. His companions took out the bolt used to keep the turntable at rest and set it in motion, when the plaintiff, undertaking to mount it, was injured. There were two trials of the case; the first resulting in a verdict and judgment against the railroad company. There was a reversal in this court upon the ground that the circuit judge failed to charge as a matter of law, first, "that the defendant was not required to fasten or secure the turntable so that the injured boy could not displace such fastening and put the table in motion; second, that the defendant was not required to fasten the turntable any more securely than necessary to keep it securely in place." Upon the second trial, while following the direction of this court and giving in charge to the jury the special requests, for the refusal of which the reversal had been had, yet the trial judge by other para-

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graphs in his charge so neutralized their effect that the case was again reversed. In *Cooper v. Overton*, 102 Tenn., 235, 52 S. W., 183, 45 L. R. A., 591, 73 Am. St. Rep., 864, it is said that the rule of the turntable cases was not applicable to a case involving such facts as were disclosed by the case then in hand, and that "it should not be carried beyond the class of cases to which it has been applied."

We think to apply it under such circumstances as are disclosed in this record would be in the face of sound principle and of all well-considered authority. The judgment of the lower court is therefore reversed, and the case is dismissed.

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W. O. HARRIS *et al.* v. W. G. BOGLE.

(Nashville. December Term, 1905.)

1. **JURY TRIALS IN CHANCERY.** Rule for application to be made at trial term means the term at which the trial shall actually occur.

A chancery rule requiring that application for a jury must be made by petition in open court upon the first day of the trial term must be construed as meaning that the jury shall be demanded on the first day of the term at which the cause shall be tried, and not at the first term at which it is triable, as otherwise, the rule would be in conflict with the provision of the statute (Shannon's Code, sec. 6284).

Code cited and construed: Secs. 5739, 5740, 6138, 6159, 6160, 6164, 6205, 6210, 6211, 6220-6245, 6274, 6282-6287 (S.); secs. 3935, 3936, 4328, 4349, 4350, 4354, 4395, 4400, 4401, 4410-4433, 4457, 4465-4470 (1858).

Cases cited, distinguished and approved: Stadler v. Hertz, 13 Lea, 318, 319; Cheatham v. Pearce, 89 Tenn., 670-697.

2. **SAME.** Jury not demanded in pleadings can be demanded only after expiration of time for the other party to take his proof.

Where a jury in chancery is not demanded in the pleadings, then a jury cannot be demanded by either party until the rights of the other party has been fully enjoyed as to the time for taking proof. (*Post*, pp. 714, 715.)

Code cited and construed: Secs. 6274, 6282, 6283, 6284 (S.); secs. 4465-4467 (1858).

3. **SAME.** Waived by obtaining reference to the master and report by him.

Where a party applies for and obtains a reference of the cause to the master, he thereby waives his right to a jury trial in the chancery court, for such trial cannot be had upon the report of the master. (*Post*, pp. 710, 711.)

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Cases cited and approved: *Martin v. Martin*, 24 S. C., 446; *Rivas v. Summers*, 33 Fla., 539; *Baird v. City of New York*, 74 N. Y., 382.

4. **SAME.** Same. Waived by reference not actively sought, but accepted and acted on.

Order of reference made in form upon the chancellor's own motion, but in fact suggested by him, and granted in order to enable the party to get in his proof, which he accepted and acted upon, operates as a waiver of a jury trial in chancery, as stated in the third headnote. (*Post*, p. 716.)

Cases cited and approved: *Kelly v. Smith*, 1 Blatchf., 290; *Atkinson v. Whitehead*, 77 N. C., 418; *Grant v. Hughes*, 96 N. C., 177.

FROM DAVIDSON.

APPEAL from the Chancery Court of Davidson County.
—JOHN ALLISON, Chancellor.

JOHN M. GAUT, for complainants.

SAMUEL N. HARWOOD, for defendant.

MR. JUSTICE NEIL delivered the opinion of the Court.

The first question to be determined on this appeal depends upon the construction and validity of rule 35 of the chancery court of Davidson county. That rule, so far as it is necessary to quote, for the purposes of the present inquiry, reads as follows:

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"Rule 35. Application for a jury must be made by petition in open court upon the first day of the trial term."

The cause was put at issue by the filing of an answer during the April term, 1904. The jury was demanded by defendant on the 1st day of the October term, 1905. The chancellor declined to grant the application, and his action is defended here under the rule above quoted.

It is insisted by the defendant that a proper construction of the rule would authorize an application for the jury at any term of the court at which the case might be tried. The complainants insist that the true construction is the first term at which the case is triable. This was the view adopted by the learned court of chancery appeals.

It is also insisted by the defendant that under the sections of the Code, which authorize trials by jury in chancery, an application can be made at any time during any term after the cause is at issue, and that the rule above quoted is in any event contrary to the sections of the Code referred to, and is void.

The Code sections upon the subject are as follows:

"6282. *Either party may have jury.* — Either party to a suit in chancery is entitled, upon application, to a jury to try and determine any material fact in dispute, and all the issues of fact in any case shall be submitted to one jury.

"6283. *At first term, when.* — If the demand is made in the pleadings, the cause shall be tried at the first

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term before a jury summoned instanter, in the same way that jury causes are tried at law.

"6284. *When cause is ready for hearing.* — If the demand is only made after the cause is ready for hearing, the trial will be before a jury summoned instanter upon the like evidence as a suit at law, together with such parts of the bill, answers, depositions, and other proceedings in the cause, as the court may order.

"6285. *Issues.* — The issues shall be made up by the parties under the direction of the court, and set forth briefly and clearly the true questions of fact to be tried.

"6286. *Trial.* — The trial shall be conducted like other jury trials at law, the finding of the jury having the same force and effect, and the court having the same power and control over the finding, as on such trials at law.

"6287. *Witnesses.* — The parties in all jury trials in chancery (may) summon witnesses and enforce their attendance, as at law."

The sections of the Code which authorize the chancellors to make rules are the following:

"5739. *Majority may make rules.* — The chancellors of this State, or a majority of them, may make such rules as they may deem beneficial and proper to regulate the practice of the chancery courts, not inconsistent with the provisions of this Code; and the rules thus agreed upon shall be obligatory on all the chancery courts.

"5740. *If not, each chancellor may.* — In the absence

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of any such action by the chancellors as a body, each chancellor may make rules and regulations of practice for the purpose of expediting business in his own chancery division."

It is observed that the sections last quoted forbid the making of any rules which are inconsistent with the provisions of the Code.

The rule above quoted has no application to the case contemplated in Code, sec. 6283. If there be any conflict it must be with the provisions of section 6284. This provides for the making of an application "after the cause is ready for hearing." That section does not, in terms, give the right to demand a jury at any time after the cause is ready for hearing. This omission left the matter open to regulation by rule of the court under the sections of the Code above quoted upon that subject.

The validity of such rules was elaborately considered by this court in the case of *Cheatham v. Pearce*, 89 Tenn., 670-691 et seq., 15 S. W., 1080. See, also, the case of *Stadler v. Hertz*, 13 Lea, 318, 319.

In the case last cited, the rule which the court considered and held valid contained the provision that no jury should be allowed in the court, unless the demand therefor should be made on or before the second day of the term on the motion docket or at the bar of the court. The rule which was held valid in *Cheatham v. Pearce*, was "that application for a jury must be made within the first three days of the trial term."

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The following sections of the Code throw light upon the subject.

"6138. *Issue and trial.* — If the plaintiff do not except to the answer within the time prescribed by law, the issue shall be regarded as made in the same way as if replication had been filed, and the cause shall stand for trial at the first term of the court after answer filed; and, if at that or any other term the cause is continued, it shall stand for hearing at the next term.

"6210. *Notice of answer filed; twenty days' exception.* — When an answer has been filed, the clerk and master shall notify the complainant's solicitor of the fact, by letter or otherwise, and he may, within twenty days, file exceptions thereto.

"6211. *If no exception, cause at issue; trial at first term.* — If the plaintiff fail to except to the answer within said time, the cause shall be at issue, and stand for trial at the first term after the answer is filed.

"6244. *Causes at issue without replication, and stand for trial at first term.* — All causes are at issue, without replication filed, if the plaintiff fail to except to the answer of the defendant within the time prescribed by law, and shall stand for trial at the first term of the court after answer filed, and at every term thereafter, if not then heard."

The first trial term is the term at which the issue is thus made up.

Does the rule mean that the jury must be demanded at this term? If so it must be held void as in conflict

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with section 6284 of Shannon's Code. That section plainly contemplates that a jury may be demanded "after the cause is ready for hearing." That this does not mean merely after the cause is at issue is shown by the provision further on in the section that upon such demand being made the cause may be heard, among other things, on "depositions, and other proceedings in the cause." This indicates that the legislature had in mind a case which had been sufficiently long at issue to permit the parties to take evidence in the form of depositions; indeed the ordinary occurrence in practice wherein it appears the cause has been put at issue and the parties have prepared it either partially or wholly by the taking and filing of depositions, documentary evidence, etc. These provisions cannot be harmonized with a rule requiring the demand of a jury on the first day of the first term at which the cause could be tried, that is on the first day of the term at which the cause is put at issue. For example, the present cause was put at issue on June 4, 1904, which was during the April term of the court. The construction insisted upon would require that the jury should have been demanded on the first Monday in April, 1904, which was the first day of the first term at which the cause was put at issue, and at which it was triable; that is that it should have been demanded months before issue made, and before it was possible that there could be any depositions on file in the cause.

The rule should be so construed as to bring it into har-

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mony, if possible, with the Code section last referred to. This harmony is effected by construing it to mean that the jury shall be demanded on the first day of the term at which the cause shall be tried.

The learned court of chancery appeals was in error in its citation of the case of *Cheatham v. Pearce*, supra, as supporting its construction. An examination of that case will disclose that the bill was filed July 22, 1889, against C. S. Pearce and Thomas Ryan, as partners, and also against C. B. & C. D. Pearce (89 Tenn., 672, 15 S. W., 1080); that a plea in abatement and an answer to so much of the bill as was not covered by the plea, were filed by Pearce & Ryan, September 2, 1889 (89 Tenn., 673, 675, 15 S. W., 1081, 1082); that on the same day C. B. & C. D. Pearce filed a plea in abatement (89 Tenn., 675, 15 S. W., 1082), to the whole bill (89 Tenn., 680, 15 S. W., 1083); that on November 27, 1889, a replication was filed by the complainant to both pleas (89 Tenn., 682, 15 S. W., 1083), which was during the October term, 1889. Thus the cause was put at issue during that term. A jury was demanded in the replications, but this was held ineffective, because not called to the attention of the chancellor. On this special phase of the matter the court said (page 696 of 89 Tenn., page 1086 of 15 S. W.): "We believe no case can be found in our reports where the chancellor has ever ordered a jury trial at the application of one of the parties unless the application was made to the chancellor by motion in open court; and a demand for a jury in a repli-

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cation or other pleading is not a compliance with the practice."¹ The application which the court had under examination and which it considered and treated as the only formal application for a jury trial in the cause was the one which was made on May 27, 1890 (89 Tenn., 683, 15 S. W., 1083), which was during the April term, 1890, at which term the cause was in fact tried (89 Tenn., 686, 15 S. W., 1084), and of this application, the court said: "It is true that complainant did apply to the chancellor in open court for a jury, but unfortunately, the application was not made 'within the first three days of the trial term' as required by the rule of April 10, 1889, and therefore was made too late." 89 Tenn., 696, 697, 15 S. W., 1086, 1087.

It is thus seen that the court's view of the matter, as expressed in the opinion referred to, was that the term intended was the term at which the cause was actually tried, and that the decision was that the jury must under the rule be demanded within the first three days of that term; not within the first three days of the term at which the cause was first triable.

The same result is reached on a careful examination of *Stadler v. Hertz*, supra. When the application for a jury was made the cause had been at issue about a year, and no evidence had been filed by the complainants. When forced into trial after this lapse of time they demanded a jury in order that they might escape the effect of their failure to take proof at an earlier date. Speaking to this subject the court said: "Nor do we think

¹ The court was not considering a case falling under section 6283, under which the application is made in the bill or answer. The replication was treated as a mere similiter (89 Tenn., 696, 15 S. W., 1086).

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that the court below was in error in refusing a jury to complainants. For the purpose of saving costs and time, and to have all jury cases tried about the same time, and for the convenience of the court as recited therein, a rule of court was published and entered upon the minutes of the court, declaring that no jury will hereafter be allowed in this court, unless the demand therefor be made on or before the second day of the term, by motion on the motion docket, or at the bar of the court. This we think a reasonable regulation, preventing surprise to the adverse party and affording opportunity to obtain a jury. The motion in this case was made more than a week after the beginning of the term, and on the same day on which the cause was heard and the decree entered."

It is apparent that the court entertained the view that the application would have been in time if made on or before the second day of the term at which the cause was tried. It follows, therefore, that the application in the present case was within time, under a true construction of the rule, having been made on the first day of the term at which the cause was tried.

However, the jury was properly denied to the complainant, because he had waived the right by applying at the previous term for and obtaining a reference of the cause to the master. The hearing had at the October term was on the report of the master. By such successful application for a reference the complainant waived the right to a jury trial. He could not have such

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a trial upon the report of the master. *Martin v. Martin*, 24 S. C., 446; *Rivas v. Summers*, 33 Fla., 539, 15 South., 319; *Baird v. City of New York*, 74 N. Y., 382.

On the ground last stated the decree of the court of chancery appeals is affirmed, with costs.

ON PETITION TO REHEAR.

Complainants' petition is overruled, but in considering the points made therein it has occurred to us that in order to prevent a misconception, we should make some additional observations upon one phase of the subject discussed in the original opinion.

It is first to be noted that the system of appearance and trial terms pertaining to courts of law has no place in our chancery practice; hence the cases which complainants' counsel cite concerning trial term at law have no bearing. In chancery the issue is made up, not at appearance terms, but chiefly at rules. Each day of the term is a rule day, and the first Monday of every month during vacation. Shannon's Code, sec. 6233. While subpoenas to answer may in some instances be made directly returnable to terms of court (Shannon's Code, section 6160), they are, in general, to be made returnable to rule days (section 6159); also publication notices (section 6164; *Fellows v. Cook*, 10 Heisk., 81, 82, 83). When the terms of court continue long enough such process, if issued more than five days before the term, may be made returnable to any Monday of the term, and if executed five days before such return day,

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the defendant must cause his appearance to be entered, and make defense, or obtain time therefor within the three succeeding days and the cause will stand to be proceeded in at that term (Chancery Rule 11; Shannon's Code, p. 1783), if such process be executed within five days before such return day, then it is to be returned to the succeeding Monday, and the defendant is allowed the three succeeding days thereafter to cause his appearance to be entered, and make defense or obtain time therefor, and the cause will stand to be proceeded in at that term (Id., sec. 2).

Large powers are vested in the chancellor and in the master to facilitate the preparation of causes during vacation. Sections 6220-6245.

A rule may be made in the master's office during vacation requiring either party to take any step necessary to the progress of the cause. Section 6199. If this step be not taken the chancellor can at the next term make the rule peremptory, requiring compliance with it on penalty of dismissal. Section 6200.

Upon being summoned to answer, the defendant may make defense by demurrer, plea, or answer, but upon such demurrer or plea being overruled, he must answer by the next rule day, if no time be granted by the court. Section 6205. The next rule day during the term of the court would be the next day.

Upon answer being filed, whether in vacation or in term time, it is the duty of the clerk and master at once

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to set the cause for hearing, and transfer it from the rule docket to the trial docket. Section 6243.

The cause is then ready for the taking of testimony, and it is the duty of the parties to proceed. Section 6273, rule 1, section 6; Shannon's Code, p. 1777.

The general chancery rule (rule 2, sec. 4), and the Code (Shannon's Code, sec. 6274), allow to each party four months in which to take original evidence and two months for rebutting evidence. This does not mean, however, that six months must elapse after a cause in chancery is at issue before either party can force the other to trial. *Rather v. Williams*, 94 Tenn., 543, 29 S. W., 898.

In the case cited, the complainant obtained a trial at the expiration of three months and five days from the date when the cause was put at issue. He accomplished this by taking his own evidence promptly and notifying his adversary that he had closed his case. The state of the pleadings was such that the defendant had no original evidence to offer. Two months elapsed between the date of the notice to him, and the day when the cause was called for trial. Of course he could have introduced his rebutting evidence within this time, if he had any. But he did not show that he had any such evidence. He stood simply upon the rule, claiming that a trial could not be demanded as a matter of right until six months had expired. The court held this position was untenable.

Although some delay necessarily results where the

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parties avail themselves of the benefits of rule 2, section 4, and of Code, section 6274, however much its operation may be restricted by the diligence of either party, it must be remembered that the rule does not apply where a jury trial is demanded, in the pleadings under section 6283. The necessity for its use, the time to take and file evidence, is superseded by the presence of the witnesses themselves before the court and jury.

The next section (6284) quoted in the original opinion, contemplates a case where the demand is not made until after the cause is at issue. It applies equally to cases in which no evidence has been filed, to those in which some evidence may be on file, and to those in which all the evidence is on file in the form of depositions or documentary evidence.

In the first of these the evidence is supplied by the testimony of witnesses introduced on the trial; in the second, the depositions and documentary evidence are supplemented by oral evidence; in the third the evidence is already complete.

But in determining the meaning of this section, it should be construed in connection with the one immediately preceding it, and also with section 6274, and chancery rule 2, sec. 4. Holding all of these provisions under one view, we think the following conclusion is obvious and inevitable.

If a jury is not demanded in the pleadings filed by either party, under section 6283, then the case falls within the operation of section 6274, and chancery rule

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2, section 4, and a jury cannot be demanded by either party, under section 6283, until the rights of the other have been fully enjoyed under section 6274, and the said rule 2, section 4.

But, as has been already pointed out, that time is by no means necessarily six months from the day the cause was put at issue. It has been seen by the example which the case of *Rather v. Williams*, supra, furnishes, that the complainant may sometimes, by diligence on his own part, reduce the time by about one-half. Cases may be conceived where the reduction would be even greater.

Thus it may often happen, where the terms of court are long, particularly in the cities of the state, that issue will be made, proof taken, and the cause stand for trial, all within the period of a single term.

Now what are the rights of the parties in respect of a jury trial in a situation such as this? We think it clear that, after the cause has thus become ready for hearing, either party would have the right at any time thereafter, during that term, under section 6284, to demand a jury trial.

Rule 35 could have no application to such a state of facts, because, if so construed, it would be brought into conflict with the statute. Or, to state the point in a different way, in so far as the general language in which the rule is couched would extend its operation to cases in such a situation it must be held void. But its operation would be free and unembarrassed at any subsequent

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term. What is said in the original opinion, therefore, upon the subject, must be understood as qualified and explained here.

The defendant's petition to rehear is also overruled. The point made in this petition is that defendant did not apply for the reference, but it was made upon the chancellor's own motion. This is the form of the matter, but not the substance. What happened was that the chancellor himself suggested the order of reference, and granted it, in order to enable the defendant to get in his proof. He accepted and acted on it. The principle is the same. *Kelly v. Smith*, 1 Blatchf., 290, Fed. Cas., No. 7675; *Atkinson v. Whitehead*, 77 N. C., 418; *Grant v. Hughes*, 96 N. C., 177, 2 S. E., 339.

Osborne v. State.

OSBORNE v. STATE.

(*Knoxville*. December Term, 1903.)

LARCENY. A pistol may be the subject of.

Although a pistol may have no market value, its sale within the State being prohibited by statute, it is valuable to the owner and is, therefore, property which may be the subject of larceny.

Code cited: Sec. 6650 (S.).

Cases cited: *Rex v. Clark*, 2 Leach, C. C., 1036; *Com. v. Riggs*, 14 Gray (Mass.), 376; *Com. v. Lawless*, 103 Mass., 425; *Wolverton v. Com.*, 75 Va., 909; *State v. May*, 20 Iowa, 305; *Com. v. Coffee*, 9 Gray (Mass.), 139; *Kreiter v. Nichols*, 28 Mich., 496; *Bales v. State*, 3 W. Va., 685.

FROM RUTHERFORD.

APPEAL in error from the Circuit Court of Rutherford County.—JOHN E. RICHARDSON, Judge.

Z. T. CASON, for Osborne.

ATTORNEY-GENERAL CATES, for State.

MR. JUSTICE SHIELDS delivered the opinion of the Court.

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The plaintiff in error was indicted and convicted in the circuit court of Rutherford county of the offense of larceny. The property stolen is described in the indictment as "one pistol, of the value of fifteen dollars." The case is here by appeal in the nature of a writ of error, and the error assigned is the action of the trial judge in charging the jury that a pistol may be the subject of larceny in Tennessee.

The contention is that a pistol is not personal property and had no market value in this State, and therefore is not the subject of larceny. It is predicated upon the statute (Shannon's Code, sec. 6650) making it a misdemeanor for any person to sell or offer to sell, or bring into the State for the purpose of selling, giving away, or otherwise disposing of, pistols of any kind other than army or navy pistols.

This contention is not sound. The statute does not prohibit one from owning a pistol. The fact that the sale of pistols is prohibited does probably have the effect to prevent them from having a market value in Tennessee, but it does not destroy their actual value. The owner of a pistol, while he cannot carry or sell it in Tennessee, may keep it in his residence or place of business for his protection, or send it from the State for sale. While it appears from the proof that there is no market in Tennessee for pistols of the character of the one stolen, it also appears that this one is worth \$15. It is not necessary that personal property have a market value in order to be the subject of larceny. It is

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sufficient that it be valuable to the owner, and the extent of the value only affects the grade of the crime. *Rea v. Clark*, 2 Leach, C. C., 1036; *State v. Allen*, R. M. Charl't. (Ga.), 518; *Commonwealth v. Riggs*, 14 Gray (Mass.), 376, 77 Am. Dec., 333; *Commonwealth v. Lawless*, 103 Mass., 425; *Wolverton v. Commonwealth*, 75 Va., 909.

It is also well settled that a chattel kept for an unlawful purpose, such as intoxicating liquors kept for sale in violation of law, or gambling paraphernalia, the possession of which is prohibited, may be the subject of larceny. *State v. May*, 20 Iowa, 305; *Commonwealth v. Coffee*, 9 Gray (Mass.), 139; *Kreiter v. Nichols*, 28 Mich., 496; *Bales v. State*, 3 W. Va., 685.

There is no error in the judgment of the trial court, and it is affirmed.

Railway Co. v. Doak.

TENNESSEE CENTRAL RAILWAY CO. v. DAVE DOAK.

(*Nashville*. December Term, 1905.)

ACTION. By parent for injury to minor child, not maintainable.
An action to recover damages for personal injuries to an infant must be brought in his own name and cannot be maintained by his parent.

Code cited and construed: Secs. 4503, 4504 (S.); secs. 3503, 3504 (M. & V.); secs. 2803, 2804 (1858).

FROM OVERTON.

APPEAL in error from Circuit Court of Overton County.—CORDELL HULL, Judge.

CONATSER & CASE and J. H. BOWMAN, for Railway Company.

A. H. ROBERTS, for Doak.

MR. JUSTICE SHIELDS delivered the opinion of the Court.

Railway Co. v. Doak.

This action was begun before a justice of the peace of Overton county by Dave Doak against the Tennessee Central Railroad Company to recover damages in the sum of \$495 for injuries sustained by his daughter, Fanny Doak, then twelve years of age, while alighting from one of the company's trains at a station. The daughter is not a party. There was judgment in the circuit court, to which the case had been appealed, against the plaintiff in error for \$150, and it has brought the case to this court by proper proceeding and assigned errors.

This judgment must be reversed. An action to recover damages for wrongful and negligent injuries to an infant under twenty-one years of age must be brought in his or her own name. Code, 1858, sec. 2804; Shannon's Code, sec. 4504.

The father, or, in case of his death or desertion of his family, the mother, can only sustain an action for the expenses and actual loss of service resulting from an injury to a minor child in the parent's service or living in the family. Code, 1858, sec. 2803; Shannon's Code, sec. 4503.

This action is brought by the father only, and is for damages sustained by the infant child. It is not a suit for expenses or loss of service resulting from an injury to the child, nor is there any proof in the record to sustain such an action.

The judgment is reversed, and, as no recovery can be had upon another trial, the suit will be here dismissed.

Ayres v. State.

AYRES v. STATE.

(*Nashville*. December Term, 1905.)

1. **ARSON.** Indictment. Sufficient description of property.

An indictment for arson which alleges that the building burned was situated in a designated city sufficiently describes the building.

Cases cited and approved: *Com. v. Lamb*, 1 Gray, 493; *State v. Price*, 11 N. J. L., 208; *State v. Meyers*, 9 Wash., 8; *Baker v. State*, 25 Tex. App., 1.

2. **SAME.** Same. Not necessary to allege value of building, when.

An indictment for arson need not allege the value of the property burned; such an allegation is only necessary where value enters into the degree of crime, or affects the punishment.

FROM DAVIDSON.

APPEAL in error from the Criminal Court of Davidson County.—W. M. HART, Judge.

R. L. MAYFIELD, for Ayres.

ASSISTANT ATTORNEY-GENERAL FAW, for the State.

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MR. CHIEF JUSTICE BEARD delivered the opinion for the Court.

This record embraces two indictments and two convictions for statutory arson. In each case there was a motion to quash, which was overruled. Subsequently there were motions in arrest. The ground of these motions was that the description of the property was too vague and uncertain to put the defendant on notice, in this: that the averment in each case was that the property feloniously burned was "situated in the city of Nashville."

The counsel of the defendant relied for his contention on *State v. Wacker*, 16 Mo. App., 417, in which it was held that such a description was too indefinite; but the weight of authority is that it is enough in an indictment for arson to allege that the building burned is within the jurisdiction of the court. In *Com. v. Lamb*, 1 Gray, 493, an averment that defendant "at and in the county of P., did . . . set fire to and burn a certain barn," was held sufficient. Again, the allegation that defendant "at the township aforesaid, . . . one barn of the property of one Nicholas Ryerson, not parcel of the dwelling-house of Nicholas Ryerson there situated, wilfully and maliciously did burn," etc. (*State v. Price*, 11 N. J. Law, 203), and the averment that defendants, "in the county of Spokane, State of Washington, did then and there unlawfully . . . maliciously set fire to and burn a certain storehouse building" (*State v. Meyers*, 9 Wash., 8, 36 Pac., 1051), were held to be suffi-

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ciently definite. To the same effect is *Baker v. State*, 25 Tex. App., 1, S. W., 23, 8 Am. St. Rep., 427.

Nor was averment of the value of the property burned necessary. This is only essential when value enters into the degree of crime, or affects the punishment. 3 Cyc., 999.

The judgment of the lower court is affirmed.

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STATE v. WILSON *et al.*

(Nashville. December Term, 1905.)

1. **PERJURY.** Presentment for, joining two defendants, is bad for duplicity.

A presentment charging two defendants jointly, and in the same count, with the crime of perjury, is bad for duplicity.

Case cited and approved: State v. Roulstone, 3 Sneed, 108.

2. **GRAND JURY.** Statutes granting inquisitorial powers to, strictly construed.

The inquisitorial power of the grand jury was unknown to the common law, and it exists in this State with respect to any given offense only when expressly conferred by statute, and such statutes, being in derogation of the common law, are construed strictly.

Cases cited and approved: State v. Smith, Meigs, 99; Harrison v. State, 4 Cold., 195; State v. Lee, 87 Tenn., 116.

Case cited and distinguished: Glenn v. State, 1 Swan, 19.

3. **SAME.** Same. No inquisitorial power in respect of violation of liquor dealer's oath.

The crime of perjury committed by violating the oath required as a prerequisite to the issuance of a license to retail spirituous or vinous liquors is not within the meaning of that section of the Code which authorizes the grand jury to send for witnesses whenever they, or any of them, suspect a violation of the laws against "gaming" or "tippling."

Code cited and construed: Secs. 993, 6781, 7046 (S.); secs. 360, 5668, 5912 (M. & V.); secs. 691, 4858, 5087 (T. & S. and 1853).

Act cited and construed: 1865, ch. 29.

Cases cited and approved: Harney v. State, 8 Lea, 113; Dunaway v. State, 9 Yerg., 350; Sanderlin v. State, 2 Humph., 315.

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4. CODE OF 1858. In construction of, may look to original statute in doubtful cases. Omitted provision inoperative, when.

A general rule in relation to the construction of the Code of 1858 is that, in doubtful cases, it will be presumed that it was not intended to change, but only to revise or compile, the old statutes, and a statute in existence prior to the Code may be looked to in such cases; but where an important provision of the statute has been entirely omitted, it is wholly inoperative.

Case cited and approved: *Tennessee Hospital v. Fuqua*, 1 Lea, 612.

5. SAME. Same. Same. Case in judgment.

Section 4858 of the Code of 1858 (sec. 5668, M. & V. and sec. 6781, Shan.), providing that any person who violates the liquor dealer's oath shall be guilty of perjury, was taken from sec. 4, ch. 90, Acts 1845-46, entitled, "An Act to tax and regulate tippling and tippling houses," wherein inquisitorial power over all violations of the act was expressly granted to the grand jury; but the Code of 1858 omits the grant of inquisitorial power in respect of statutory perjury as conferred by said Act of 1845-46.

Held: That such omission from the Code of 1858 was the work of the legislature, and not merely an inadvertence of the compilers, and such omitted provisions is wholly inoperative.

Code cited and construed: Sec. 6781 (S.); sec. 5668 (M. & V.); sec. 4858 (T. & S. and 1858).

Act cited and construed: 1845-46, ch. 90.

FROM DAVIDSON.

APPEAL from Criminal Court of Davidson County.—
W. M. HAET, Judge.

State v. Wilson.

PITTS & McCONNICO and W. C. CHERRY, for Wilson
et al.

ASSISTANT ATTORNEY-GENERAL FAW, for the State.

MR. JUSTICE McALISTER delivered the opinion of the
Court.

This is a presentment against the defendants, charging them jointly and in the same count with the crime of perjury. It is charged in the presentment that "Matt Wilson and Tom Russell heretofore, to wit, on the — day of March, 1903, unlawfully, feloniously, willfully, deliberately, maliciously, absolutely, and corruptly swore falsely to a certain material matter as follows: The said Matt Wilson did procure and obtain on November 17, 1902, a certain license to sell and tippie spirituous, vinous, and fermented liquors in a certain house at the corner of College street and Public Square, in the city of Nashville and county aforesaid. Said license was regularly and duly issued by and procured from P. A. Shelton, the regularly elected and qualified clerk of the Davidson county court; he, the said clerk, then and there having the power to issue said license. At the time of the issuance of said license by the said clerk, he, the said Russell, being then and there an agent of and connected with said Wilson in said business, regularly and duly swore to a certain oath before J. E. Shelton, a regularly appointed and qualified deputy clerk of said court; said oath being material and necessary to

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the issuance of said license, and the said J. E. Shelton, deputy clerk as aforesaid, having lawful authority to administer said oath, which is as follows:

“‘I do solemnly swear or affirm that I will not, under the license I am about to obtain, knowingly permit or connive at any gambling for money, or any other valuable consideration, in the house in which I am retailing spirits, or in any other place, of which I may have control, either directly or indirectly, and if any person should game or bet to my knowledge (and I will exercise due diligence to know) I will give information thereof to the grand jury of my county at the next term of court.

“‘I will not sell to minors contrary to law, so help me God.

“‘[Signed.]

MATT WILSON,

“‘TOM RUSSELL.

“‘Sworn to and subscribed before me this 17th day of November, 1902.

“‘J. E. SHELTON,

“‘Deputy Clerk of Davidson County Court.’”

It is then charged that after the said Matt Wilson and Tom Russell had taken said oath, as aforesaid, to wit, on the — day of March, 1903, while doing business under said license in said house as aforesaid, and in violation of said oath, they, the said Matt Wilson and Tom Russell, unlawfully, feloniously, knowingly, and willfully did permit and connive at certain gambling for money and other valuable considerations in said

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house in which said liquors were then and there being retailed under and by authority of said license as aforesaid.

"So the grand jurors aforesaid do present and show on their oath aforesaid that the said Matt Wilson and Tom Russell, on the day and year aforesaid, in the county aforesaid, by means of the false swearing aforesaid, were guilty of unlawful, felonious, willful, deliberate, premeditated, malicious, absolute, and corrupt perjury, to the evil example of all like offenders and against the peace and dignity of the State."

This presentment was found at the June term, 1903, of the criminal court of Davidson county. And at the January term, 1906, the following entry appears upon the minutes:

"Thereupon this cause was heard by the court on the following motion of defendants to quash, viz.: 'In this cause the defendants demur to the presentment returned by the grand jury against them, and move to quash said indictment upon the following grounds: (1) The grand jury possesses no inquisitorial power with reference to the offense charged in the indictment, and no prosecutor appeared in the case, and the name of the attorney-general is not signed thereto. (2) Said presentment charges no offense under the laws of this State, in that it does not specify any game of chance that was carried on or prosecuted by anyone within said house. It does not give the name of any game of chance so played or carried on at said house, and in undertaking to specify

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the offense charged it states the legal conclusions of the draftsman and not the facts which constitute the offense. (3) Said presentment is bad for duplicity, because two or more defendants cannot be jointly indicted in the same count or jointly presented in the same count, for the offense with which these defendants stand charged. (4) Said Tom Russell as the agent of the defendant Wilson was not required by law to take any oath, and cannot be guilty of any offense under the statutes of this State for the breaking of the oath set out in the presentment. (5) The oath under which the presentment was returned is obnoxious and unconstitutional class legislation. (6) Said act is unconstitutional because it enacts a cruel and unusual punishment. (7) Said act is void because it provides no penalty, and a promissory oath cannot be perjury. Wherefore defendants pray judgment, and that they go hence.'

"Upon argument of counsel, and due deliberation whereof, the court is of opinion that the motion to quash is well made, and therefore quashes the presentment herein and orders that defendants go hence."

The State appealed, and has assigned the action of the court as error. This presentment is based upon section 993 of Shannon's Code (section 691 of the Code of 1858), as follows: "License [for selling liquors] may be granted to a person competent to take the same, upon the following conditions: . . . (3) That he [meaning the applicant for the license] and in case of a partnership that all the members thereof take and subscribe

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the following oath," which has already been set out above and need not be repeated here.

By section 6781 of Shannon's Code (section 4858 of the Code of 1858), it is provided: "6781 (4858). Any person who, after having taken out a license to retail spirituous or vinous liquors, violates the oath required previous to the issuance of his license, is guilty of perjury."

Sections 6697 and 6698 of Shannon's Code (sections 4793 and 4794 of the Code of 1858) define the offense of perjury, and fix its punishment at confinement in the State prison for a period of not less than three nor more than fifteen years.

The first fatal infirmity in this presentment is found in the fact that it jointly charges two defendants in the same count with the crime of perjury. In other words, the presentment is bad for duplicity. The offense charged may, of course, be committed by the defendants severally; but in the nature of things there can be no concurrence in the commission of the same act of perjury at the same time by two separate and distinct individuals.

In *State v. John Roulstone*, 3 Sneed, 108, it appeared that the defendants were jointly indicted in a single count for the offense of uttering obscene language in the presence of the public. The trial judge quashed the indictment for duplicity, and on appeal the judgment below was affirmed. This court, in considering an analogous question, said:

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"There can be no doubt as to the correctness of the judgment, according to the authorities. The indictment is bad for duplicity. Two may be severally, but not jointly, guilty of uttering the same abusive word. If both speak the words at the same or different times, still the offense of each would be distinct, and they could not be joined in the same count. Torts are in their nature several, and each offender must answer for his own individual crime; yet, where the acts are such in their nature that several may join in their perpetration, they may be proceeded in jointly. Of this character are homicides, trespasses, larcenies, riots, and all others which admit of the agency of several in their commission. All such offenders may be either jointly or separately prosecuted. Archb. Cr. Pr., 96.

"But in that class of cases in which but one can act, two or more cannot be joined in the charge. Two cannot be guilty of the same act of perjury, barratry, and the like offense, because the act which constitutes the offense must in its nature be several and personal [citing Chitty and Archbold].

"In perjury, as well as the offense of obscenity, the crime is committed by words spoken, and the same words uttered by one cannot be possibly applied to those which proceeded from another. If two or more be guilty, it must be by separate distinct acts. There can be no unity in the act which constitutes the crime. Each offender has to answer for himself and alone, and not for or with another."

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The trial judge was therefore correct in holding this presentment bad for duplicity.

The next question arising on the record is in respect of the inquisitorial power of the grand jury with reference to the offense charged in the presentment.

As already seen, the presentment was not founded upon the personal knowledge of any one of the grand jurors, but upon the testimony of witnesses summoned before said grand jury at its own instance. In *State v. Lee*, 87 Tenn., 116, 118, 9 S. W., 426, 427, this court, in considering the inquisitorial power of the grand jury, said:

"The extent of this investigation, however, is not unlimited in all cases. It is to be determined by the offense itself and the law relating thereto. If it is an offense of which the legislature has given the grand jury inquisitorial power, witnesses may be sent for and examined, and upon their testimony a presentment may be based; but, if it is an offense with respect of which inquisitorial power has not been especially granted by statute, the investigation must be confined to the grand jurors themselves, and in such case they can make a lawful presentment only upon knowledge or information possessed within themselves. . . .

"The inquisitorial power of the grand jury was unknown to the common law, and it exists in this State with respect to any given offense only when expressly conferred by statute. The offense charged in the presentment before us, not having been embraced in any statute conferring such power, cannot, therefore, be law-

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fully presented upon the testimony of witnesses called and examined under the mistaken assumption of the existence of such power."

It is conceded that no inquisitorial power is expressly granted in the statute to the grand jury for the investigation of charges of perjury; but the insistence on behalf of the State is that this offense may be investigated by the grand jury under the inquisitorial power conferred in cases of gaming and tippling. The argument is that the breach of the preliminary oath by those engaged in selling liquor by retail is denounced by the statute as perjury, and, since it was committed by allowing gaming on the premises of the saloon keeper, it falls under the inquisitorial power of the grand jury touching cases of gaming; and it is especially contended that it is embraced in the inquisitorial power of the grand jury in cases of tippling, since the statutory offense of perjury was committed in connection with tippling.

It is shown by counsel that the only provisions of the Code of 1858 granting to the grand jury inquisitorial power are embraced in section 5087: "The grand jury shall send for witnesses whenever they or any of them suspect a violation of the laws against (1) gaming; (2) taking tolls at turnpikes, or toll bridges, not opened according to law; (3) illegal voting; (4) tippling; (5) disturbance of worship; (6) injuries to public buildings."

Since the adoption of the Code of 1858, the grand jury has been given inquisitorial power over many other of-

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fenses, which are enumerated in section 7046 of Shannon's Code.

As illustrating the strictness of construction of the inquisitorial power granted to the grand jury with respect to certain designated offenses, it being conceded that such power is in derogation of the common law, several cases may be cited. In *State v. Smith*, Meigs, 99, 33 Am. Dec., 132, it appeared the defendant was indicted for betting on an election and no prosecutor was marked upon the indictment. The presentment was found upon evidence of witnesses sent for by the grand jury. In that case it appeared that by Acts 1824, c. 5, sec. 2, grand juries were authorized to send for witnesses to give evidence of unlawful gaming, and such witnesses were required to give evidence of any offense that might be known to them against the statutes to suppress gaming. By Acts 1823, c. 25, sec. 2, betting on an election was declared to be a misdemeanor, and the persons guilty thereof subject to punishment, as in cases of betting on any games of hazard, by the laws then in force.

The court held that betting on an election was not gaming within the meaning of the statute, and hence the grand jury had no inquisitorial power in respect of this offense.

In *Harrison v. State*, 4 Cold., 195, there was a presentment against the plaintiff in error for running a horse along a public road contrary to the form of the statute. The plea in abatement averred that the presentment was

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not founded upon the knowledge, evidence, or information of any member of the grand jury, but upon the evidence and information of certain witnesses who were examined and gave evidence without authority of law. It appeared that by section 4882, Code 1858, "all persons running, or aiding or abetting in running, any horse race in or along any public road in the State, or betting thereon, should be subject to all the penalties of unlawful gaming." By section 5087, Code 1858, the grand jury was given inquisitorial power to send for witnesses whenever they or any of them suspected a violation of the laws against gaming, etc. The court held that "the provisions of this statute were in derogation of the common law, and could not, therefore, be extended beyond the expressed provisions of the statute itself [citing *Glenn v. State*, 1 Swan, 19]. Now, is running a horse race along the public road within the meaning of the word 'gaming' used in the statute? We think not, at least so far as to authorize the grand jury to send for witnesses, or, after they were before them, to find this presentment upon their evidence. . . . Running a horse race on a public road, when there is no betting or wager, being, as we have seen, a substantive offense, does not, in our opinion, fall within the meaning of gaming as declared in our statute." It has been supposed that the case of *Glenn v. State*, 1 Swan, 19, is in opposition to these views. That was a presentment for retailing liquor without license in violation of the act of 1846. That act expressly granted inquisitorial power

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with reference to a number of offenses therein mentioned, including the violation of an oath taken preliminary to obtaining a liquor license. Section 13, p. 157, c. 90, Acts 1846, as it existed before the Code of 1858, was as follows: "Sec. 13. That in all cases arising under the provisions of this act, the attorney-general may file bills of indictment *ex officio*, and it shall be the duty of the grand jurors to send for witnesses in all case in which they, or either of them, may suspect a violation of this act and it shall be the duty of the judges of the circuit and criminal courts to give this act in charge."

The inquisitorial power granted by the act of 1846, it will be observed, is expressly confined to a violation of that act. But it appears from an examination of the statutes that section 13, c. 90, p. 157, Acts 1845-46, was not embodied in the Code of 1858, and is not now upon the statute book.

The opinion of this court in *State v. Smith*, Meigs, 99, 33 Am. Dec., 132, and *Harrison v. State*, 4 Cold., 195, noticed, *supra*, were based on the act of 1824, while the case of *Glenn v. State*, 1 Swan, 19, decided in 1851, dealt with the act of 1846, which was not carried forward into the Code of 1858. And thus the inquisitorial power of the grand jury in respect of statutory perjury under the act of 1846 is wholly eliminated.

In *Harney v. State*, 8 Lea, 113, this court said: "A tippling house is a place where spirituous liquors are sold and drank in violation of law (Bouv. Law Dict.); or, as defined by this court under our statute, a place

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where spirituous liquors are sold without license in less than a quart, or in any quantity to be drunk at the place (*Dunnaway v. State*, 9 Yerg., 350; *Sanderlin v. State*, 2 Humph., 315). The word 'tipple' in the act of 1877 means to sell to be drunk at the place of sale."

It will be observed that the offense has a well-understood meaning, and it is difficult to perceive how a statutory offense of perjury can be brought within the definition of tippling, so as to authorize the grand jury to exercise its inquisitorial power with respect to it. The offense denounced by the statute is made a highly penal felony, and it would be a great stretch of judicial construction to hold that this offense may be investigated by the grand jury under its inquisitorial power, either as to gaming or tippling. It is said, however, in behalf of the State, that section 6781, Shannon's Code (section 4858, Code of 1858), providing that any person violating this oath is guilty of perjury, was taken from section 4, c. 90, p. 155, Acts 1845-46, entitled "An act to tax and regulate tippling and tippling houses," wherein inquisitorial power in this class of perjury cases was expressly granted to the grand jury. The form of oath is set out in section 3 of that act. This oath was modified by chapter 29, p. 48, Acts 1865, entitled "An act to modify the oath prescribed for liquor dealers." The first section of that act is: "That the oath prescribed in article 6, section 691 of the Code (1858) be and is hereby amended as to read as follows, to wit." The oath is prescribed in Shannon's Code, section 993, subsec. 3, It is

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argued in behalf of the State that, if the grand jury had inquisitorial power (as it did) over cases for a violation of the act of 1845-46, sec. 691, Code 1858, and its cognate sections, such power would not be destroyed by the mere amendment of that act prescribing a different form of oath by chapter 29, p. 48, Acts 1865. In support of this contention *Tennessee Hospital v. Fuqua*, 1 Lea, 611, is cited, wherein this court, speaking of the Code of 1858, said: "The declared object of the legislature in the appointment of the revisers, whose work was embodied in the Code, was, in the language of its resolution, 'to revise and digest' the existing statutes, not to alter them. And this court has accordingly, in view of this fact, said that one general rule in relation to the construction of the Code is that in doubtful cases it will be presumed that it was not intended to change, but only to revise or compile, the old statutes. It is obvious that the omission of a clause in the re-enactment of a statute into a compilation might be inadvertent, and no great stress can be laid on the fact."

Conceding this to be the law with reference to the construction of the Code of 1858, the query arises, is this a doubtful case? We are asked to hold that a statutory offense, in derogation of the common law, erected by the act of 1845-46, may be investigated under the inquisitorial power of the grand jury, under the grant of a power which was entirely omitted from the Code of 1858. The Code of 1858 simply confers inquisitorial power in cases of gaming and tippling, and wholly omits

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the grant of such power in respect of statutory perjury conferred by the act of 1845-46. It was, therefore, the work of the legislature and not of the compilers in omitting this grant of power from the Code of 1858. The rule is that the statute in existence prior to the adoption of the Code may be looked to in doubtful cases; but where an important provision of the statute has been entirely omitted, it is of course wholly inoperative.

For the reasons stated and without deciding other questions, the judgment of the criminal court in quashing the presentment is affirmed.



ALVIN HAWKINS

**Associate Justice of the Supreme Court, 1865-1870, Governor
of Tennessee, 1881-1883.**

A Tribute

TO THE MEMORY OF

HON. ALVIN HAWKINS

*Formerly Governor and one of the Justices of the Supreme Court
of Tennessee.*

UPON the convening of the supreme court of Tennessee at Nashville on the 16th day of December, 1905, Hon. James D. Porter and Judge Ed. Baxter, members of the bar of said court, presented to the court the resolutions adopted by the bar of Huntingdon on June 29, 1905, in respect of the life and public services of Hon. Alvin Hawkins, formerly one of the justices of the supreme court of Tennessee, and afterwards governor of the State, and moved the court that said resolutions be spread upon the minutes of the supreme court of Tennessee.

The report of the meeting of the bar of Huntingdon, and the resolutions adopted thereat, are as follows:

"At a meeting of the Huntingdon bar on the 29th day of June, 1905, in Huntingdon, Tennessee, the following resolution was presented and adopted, unanimously:

"WHEREAS, ex-Gov. Alvin Hawkins' reputation and service were co-extensive with the entire State, and Whereas, he occupied high positions, not only in the State government, but also in the federal courts sitting in the State; therefore be it resolved by the local bar, the of Huntingdon, where ex-Gov. Hawkins lived, that the following members of the bar of Tenn-

IN MEMORIAM

essee, to-wit: Hons. W. W. Murray, James D. Porter, W. M. Randolph, W. M. Smith, L. S. Woods, W. H. Swiggart, J. R. Bond, W. C. Caldwell, John Ruhm, E. Baxter, Jno. A. Pitts, Ernest Coldwell, Robt. L. Taylor, O. P. Temple, Jesse L. Rogers, Xen Wheeler, Foster V. Brown and Thomas Curtin, be and they are hereby appointed and requested to prepare and present to the federal courts sitting in the State of Tennessee and to the supreme court sitting in the different divisions of the State, a suitable memoir of the life, character and services of ex-Gov. Hawkins, with the request that they be spread upon the minutes of said courts, and published in the Tennessee Reports.'

"The committee appointed under said resolution beg leave to submit the following report:

"Governor Alvin Hawkins was born in Bath county, Kentucky, Dec. 2, 1821, died at Huntingdon, Tennessee, April 27, 1905. His parents moved to Maury county, Tennessee, the latter part of the year 1826, and two years later to Carroll county, when Alvin was seven years of age. His early life was spent on the farm, and he was educated in the common schools of the county until he reached the age of eighteen years, when he went to the McLemoresville Academy, remaining one session. He acquired what at that time was regarded as a good English education and taught for a time in the country schools. He commenced the study of law at the age of eighteen under the Hon. Benj. C. Totten, who was at that time judge of the circuit court. At the age of twenty-one he was admitted to the bar, and soon took high rank in his profession. In politics he was a Whig and an admirer and follower of Henry Clay. In the year 1846 he raised a company of volunteers and tendered their service to the Governor for service in the Mexican war, but they were not needed, and therefore not accepted. He represented his county in the legislature in the year 1853, and at the close of the session resumed the practice of law, continuing until 1860, when he was called by his party to serve as district elector on the Bell and Everett ticket, and in December of that year he had the pleasure of meeting his co-electors and casting his ballott for Bell and Everett. In 1847 he was married to Miss Justinia Ott, of Murfreesboro, Tennessee. He was elected to congress from his district in 1862, but the election being regarded as irregular he was not seated. In 1864 he was appointed United States district attorney for the western dis-

ALVIN HAWKINS

trict of Tennessee, and re-appointed by President Johnson in April, 1865. Later in 1865 he resigned the position of district attorney and was appointed one of the judges of the supreme court of Tennessee by Gov. Brownlow, which position he held until 1868, when he resigned and retired to private life. Soon thereafter he was elected president of the Nashville & Northwestern Railway Co., but did not assume the duties of the office. In the fall of 1868 he was appointed consul-general of the United States to Havana, but owing to an epidemic of yellow fever on the island, and sickness in his family, he resigned. In 1869 he was elected one of the judges of the supreme court of the State of Tennessee, which position he held until the adoption of the constitution in 1870, when he returned to the practice of law.

"In 1875 he joined the Methodist Episcopal church and made a devoted and useful member until his death. In 1880 he was elected governor of the State and inaugurated in January, 1881, making an able, efficient and upright chief executive. He declined to allow his name to go before the legislature as a candidate for United States senator, although many of his friends believed he could be elected. He was re-nominated by his party for governor in 1882, but was defeated. After retiring from the office of governor, he again entered the practice of law at Huntingdon, and held no other public office, except he was a member of the board of trustees of the Tennessee Central College at Nashville.

"Two sons, eleven grandchildren and six brothers survive him, his wife having died some years ago.

"*Resolved*, That in the death of ex-Governor Alvin Hawkins the bar of Tennessee has lost one of its oldest and ablest members, the people of the State an able, honest and upright official, who in all his eventful public career, running through a period of many years, filling many important positions of honor and trust, he was never, even by a political enemy, charged with dishonesty. No public trust was ever betrayed by him, and he lived as he died—an honest man.

"*Resolved*, That we hereby tender the sympathies of the bar to the bereaved family.

"*Resolved* further, That a copy of these resolutions be presented to the bereaved family, and also that a copy be presented to the federal courts sitting in the State of Tennessee and the

IN MEMORIAM

supreme court sitting in the different divisions of the State, and we most respectfully ask that the same be spread upon the minutes of said courts and published in the Tennessee Reports.

W. W. MURRAY, Chairman;
JAS. D. PORTER;
W. M. RANDOLF;
W. M. SMITH;
L. S. WOODS;
W. H. SWIGGART;
JNO. R. BOND;
W. C. CALDWELL;
JNO. RUHM;
ED. BAXTER;
JNO A. PITTS;
ERNEST COLDWELL;
ROBT. L. TAYLOR;
O. P. TEMPLE;
JESSE L. ROGERS;
XEN WHEELER;
FOSTER V. BROWN;
THOMAS CURTIN,—Committee."

Ex.Governor Porter, in presenting the proceedings of the bar of Huntingdon, said:

"May it please the Honorable Court:

"I have been requested by my friends who constitute the bar of Huntingdon, Carroll county, Tennessee, to present to the court a copy of the resolutions adopted at a memorial meeting held in April last, a few days after the death of ex-Governor Alvin Hawkins, a member of that bar for more than fifty years. I am a native and citizen of the adjoining county of Henry, and from my early manhood to the day of his death I was on friendly and familiar terms with him. When I came to the bar, Governor Hawkins was a leading member of it; he maintained the reputation he then enjoyed to the end—that of a sound, safe and painstaking lawyer, free from vices, with absolute loyalty to the ethics of the profession and to the interests of his clients.

"Governor Hawkins was a prominent member of the general assembly of the State in 1855. In 1860 he was chosen a member of the electoral college of the State, and voted for Bell and Everett for president and vice-president.

"I recall his canvass of that year; it added greatly to his

ALVIN HAWKINS

reputation as a public man. He saw what all thoughtful men observed, that the union of the States was in peril, and his argument on the hustings was a plea for the preservation of the union of the States. He was a federalist, and believed that the United States was a nation. When war between the States was inaugurated he held firmly to his convictions, adhered to the union, and became a member of the republican party. He was appointed in 1864 United States district attorney for the western district of the State, and I bear testimony to the fact that no man was oppressed in his person or his property. It was a time too, when blood was at fever heat, personal animosities were rampant, the reason of men was displaced, but Gov. Hawkins, with great power and authority in his hands, conducted his office with decency, dignity and great forbearance. Later, he was appointed a judge of the supreme court of Tennessee. His courtesy to the bar was invariable; he was patient and tolerant, and administered the duties of his great office according to his best judgment of the law, and without fear or personal predilection. On the bench he exhibited great good sense, and he maintained evenness of temper at all times. I witnessed an illustration of this at the opening of the first term of the supreme court at Jackson in April, 1866. He was presiding, and read a paper reciting the fact that certain members of the bar, in violation of the attorney's oath to which they had subscribed, had engaged in an attempt to destroy the government of the United States, and before resuming practice in that court they must renew their allegiance to the United States. There was a very large attendance of members of the bar, including Judge A. O. W. Totten, Col. W. H. Stephens, Major Rains, Major Cochrane, and others of their age and class. The paper aroused indignation and resentment, but it was suppressed until the clerk was directed to call the docket. The attorney in the first cause was an unreconstructed young gentleman who sat mute when his name was called. Thereupon the judge inquired if he wished to try the case just called. The response was, "after hearing the paper just read, I do not propose to practice in this court," and resumed his seat. His action was meant to be offensive; instead of asserting his authority the judge turned to the officer of the court and said, 'Adjourn court until ten o'clock tomorrow morning.' In twenty-four hours the business of the court was resumed without friction, and without a sacrifice of the dignity of the court or the *amour propre* of the bar.

IN MEMORIAM

"After an honorable career as a justice of the supreme court he resumed the practice and continued it, with the exception of two years' service as governor, to the end of his life. When I became judge of the circuit in which he resided, he practiced in my court, and it is due to his memory to say that no member of the bar was more observant of the rules prescribed for the conduct of the public business, no man more courteous to bench and bar, and no one more respectful to litigants and witnesses.

"In 1880 he was elected governor of Tennessee and served the constitutional term of two years. He was an honorable chief magistrate of the State, he was clean in his great office, and under all circumstances he obeyed the mandate of his oath of office that he would 'see that the laws were faithfully executed.'

"I attended the funeral of this eminent citizen and saw him borne to his grave by neighbors and friends with whom he had spent a long life.

"I now move the honorable court that the memorial of his associates be entered on the minutes and published in accordance with their wishes."

In allowing the motion and ordering the resolutions aforesaid to be spread upon the minutes of the supreme court, Chief Justice Beard, speaking for the court, said:

"The distinguished service which the late ex-Governor Hawkins rendered the State in his long and varied career makes it proper that there should be preserved memorials of his character and work. It is especially proper that this be done in the records of this court, of which he was for a number of years a member. Coming to the bench, as he did, immediately after the civil war, while the jealousies and the bitterness engendered by it were still rife, yet he so bore himself that neither lawyer nor litigant, whose cause came before this tribunal, ever had occasion to question the impartiality of his rulings. It can be said of him and also of his eminent associates in this judicial work—Judges Andrews and Milligan—that when they laid off the ermine it was unstained as when it was assumed by them.

"It is deemed fit, therefore, that these resolutions of the bar of West Tennessee, commemorating the life and services of ex-Governor Hawkins, should be entered of record in this court, and it is ordered that this be done."

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*This index was prepared by R. T. Shannon, Esq., of the Nashville bar, and it affords me pleasure to acknowledge my obligation therefor.—Reporter.

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21. Jurisdiction in chancery to sell lands to pay debts of a decedent, though the estate is worth less than one thousand dollars, where there has been no suggestion of insolvency and publication thereof. Secs. 4000-4003, 4070, 4072 (S.); secs. 3105-3108, 3175, 3177 (M. & V.); secs. 2267-2270, 2330, 2332 (T. & S. and 1858)..... 596
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E. Y. H.
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HARVARD UNIVERSITY

